(1) 95-1576

No. _____

Supreme Court, U.S.
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In The
Supreme Court Of The United States
October Term, 1995

JOAN S. BORAWICK,
Petitioner

v.

MORRIE SHAY AND CHRISTINE SHAY,
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI
(WITH ATTACHED APPENDICES)

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QUESTIONS PRESENTED FOR REVIEW

I. Whether Certiorari Should Be Granted To Decide A Compelling Question of Public Importance, Regarding The Ability To Testify Chronologically Following Therapeutic Hypnosis, Being A Question Left Undecided By This Court In *Rock v. Arkansas*, 483 U.S. 44 (1987), And A Question Needing Resolution To Settle A Conflict Among Circuits in Light of This Court's Decisions in *Rock* and *Daubert v Merrell Dow Pharmaceuticals*, 113 S. Ct. 2786 (1993)?

II. Whether Certiorari Should Be Granted To Determine If The Court of Appeals For The Second Circuit Violated The Due Process Clause of The Fifth Amendment to the U.S. Constitution In The Methodology Used to Bar The Petitioner's Testimony Chronologically Following Hypnosis, When Hypnosis Was Appropriate For The Memory Loss Involved, Was Used For Therapeutic Purposes, and the Hypnotist Added No New Elements To The Petitioner's Memory?

III. Whether Certiorari Should Be Granted To Determine If The Court of Appeals For The Second Circuit Violated The Seventh Amendment Right To A Jury Trial In Suits At Common Law In The Methodology Used To Bar The Petitioner's Testimony Without Full Discovery And An Evidentiary Hearing?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

JOAN S. BORAWICK, Petitioner

v.

MORRIE SHAY AND CHRISTINE SHAY, Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner, Joan S. Borawick, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in *Borawick v. Shay*, 68 F.3rd 597 (2d Cir. 1995) (*see* Petitioner's Appendix at 1A-32A, hereinafter "App. ___").

OPINIONS BELOW

On October 17, 1995, the United States Court of Appeals for the Second Circuit issued its opinion affirming the decision of the District Court. The opinion of the court of appeals is reported at 68 F.3rd 597 (2d Cir. 1995). The court of appeals denial of this petitioner's petition for rehearing and suggestion for rehearing *en banc* is reproduced in Petitioner's Appendix at 35A.

The *in limine* rulings of the United States District Court for the District of Connecticut, barring the Petitioner's testimony, are reported at 842 F. Supp. 1501 (D. Conn. 1994). The unreported summary judgment ruling in favor of the Respondents is reproduced at Appendix 45A. An opinion denying the Respondents' previous motion for judgment is reproduced at Appendix 36A and is also reported at 1993 WL 127087 (D. Conn. 1993).

STATEMENT OF JURISDICTION

The court of appeals entered judgment on October 17, 1995. On December 29, 1995 it denied this Petitioner's petition for rehearing and suggestion for rehearing *en banc*. In accordance with Rule 13(3), the time for filing this petition for writ of certiorari runs from the December 29, 1995 denial of the petition for rehearing.

Petitioner invokes the certiorari jurisdiction conferred on the Court by 28 U.S.C.§1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment V: Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of the United States, Amendment VII:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATUTES

Fed. Rules Evid. Rule 412, 28 U.S.C.

The text of this statute is in the Appendix at 48A *et seq.*

TITLE 28, UNITED STATES CODE, § 1254: § 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the court of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree...

Fed. Rules Evid. Rule 601, 28 U.S.C.
General Rule of Competency

Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.

Title 42, United States Code, §13981 Civil rights
The text of this statute is in the Appendix at 49A *et seq.*

CALIFORNIA PENAL CODE §667.83 (1995)
Ritual abuse; Sentence enhancement
The text of this statute is in the Appendix at 51A *et seq.*

CONNECTICUT GENERAL STATUTES §52-577d
Limitation of action for damages to minor caused by sexual abuse, exploitation or assault. Notwithstanding the provisions of section 52-577, no action to recover damages for personal injury to a minor, including emotional distress, caused by sexual abuse, sexual exploitation or sexual assault may be brought by such person later than seventeen years from the date such person attains the age of majority.

CONNECTICUT GENERAL STATUTES §54-86h
Competency of child as witness. No witness shall be automatically adjudged incompetent to testify because of age and any child who is a victim of assault, sexual assault or abuse shall be competent to testify without prior qualification. The weight to be given the evidence and the credibility of the witness shall be for the determination of the trier of fact.

IDAHO CODE, VOL. 4, CRIMES §18-1506A (1994)
Ritualized abuse of a child; exclusions; penalties; definition
See, Appendix at 53A *et seq.*

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Ritualistic Acts *See*, Appendix at 57A *et seq.*

MONTANA CODE ANN. §27-2-217 (1994)
Tort actions - ritual abuse of minor
See, Appendix at 59A.

MONTANA CODE ANN. §45-5-627 (1994)
Ritual abuse of minor; exceptions; penalty.
See, Appendix at 60A *et seq.*

STATEMENT OF THE CASE

This petition concerns the circumstances under which a party in a civil case can testify after therapeutic hypnosis, and whether this Petitioner's constitutional rights to due process and a jury trial have been violated. The district court summarily disposed of the Petitioner's diversity case, filed in the district court in accordance with 28 U.S.C. §1332, without full discovery, an evidentiary hearing or trial, following an *in limine* ruling barring the Petitioner from testifying in her own case chronologically following therapeutic hypnosis. Judgment for the Respondents was affirmed by the court of appeals.

The Petitioner, Joan S. Borawick, a citizen of the State of California, filed this action in the United States District Court for the District of Connecticut on January 24, 1992 naming the Respondents, Morrie Shay and Christine Shay, her maternal uncle and aunt. The complaint alleges that the Respondents, Connecticut citizens, sexually abused the Petitioner in Connecticut at the Respondents' home in 1961 and 1964 when the Petitioner was age 4 and 7.

The Petitioner suffered from traumatic psychogenic amnesia until age 32, when on the Wednesday during the second week of February, 1989 a memory of sexual abuse involving her deceased father began to emerge while she was driving her car. *Borawick*, 842 F.Supp. 1501, 1502 (D. Conn. 1994). The Petitioner's father had long since been deceased, having died in 1973 shortly after killing a seventeen year old girl in a motor vehicle accident. App.

67A. Following this initial conscious recollection in February of 1989 of child sexual abuse by her father, a nonparty, subsequent memories of sexual abuse surfaced over the ensuing months and years. App. 4A-5A.

The Petitioner's first disturbing conscious memory concerning the Respondents was of a physical assault of a nonsexual nature by Christine Shay emerging as a flashback two days after the first memory concerning her father, on Friday, February 10, 1989 while the petitioner was in her apartment. *Borawick*, 842 F. Supp. at 1502-1503. That same evening, while alone in her apartment, the Petitioner recalled that the Respondent, Christine Shay, vaginally raped her with an object. App. 5A. Several weeks later, she began treating with Judy Hirsch, M.A., M.F.C.C., a marriage, family and child counselor, for anxiety, panic, and depression associated with the memories of childhood sexual abuse. The Petitioner was also later treated by a clinical psychologist, Carol Waldschmidt, Ph.D. who diagnosed her, in accordance with the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, DSM-III, with severe chronic Post-traumatic Stress Disorder and Dissociative Disorder Not Otherwise Specified.

The Petitioner had additional memories of sexual abuse by her aunt of a severe and heinous nature, later in 1989, in 1990 and in 1991. The Petitioner's first and only adult memory of having been sexually assaulted by the Respondent Morrie Shay, emerged in 1990. Id.

On January 24, 1992, the Petitioner commenced this action against the Respondents seeking compensatory and punitive damages for sexual assault, molestation and exploitation of her at ages 4 and 7. App. 5A. The complaint requested a jury trial. In accordance with a then existing standing order, discovery was to be completed within six months, by July 24, 1992. On July 17, 1992, the Petitioner filed a timely motion to enlarge the time for discovery expressing the need to depose out-of-state witnesses in Washington, where other family members reside, and California, where the Petitioner resides, and has been treated. Although the Respondents had no objection to the timely motion to enlarge, the

district court denied the motion on July 23, 1992. App. 5A.

The Petitioner disclosed to the Respondents that she had seen a hypnotist in 1987 and 1988 on her medical doctor's recommendation for relief from chronic fatigue and stress. In November of 1992, over three months after the discovery deadline had expired and six months after the initial disclosure that the Petitioner had seen a hypnotist, the Respondents filed a motion *in limine* seeking exclusion of all of the Petitioner's testimony on the basis that it was "hypnotically refreshed". App. 5A. The Respondents offered no expert affidavits in support of their motion. The Petitioner objected, among other reasons, based upon the incomplete state of the record, and the non-expert characterization of her memories occurring in 1989, 1990, 1991, months and years after the hypnosis, as "hypnotically refreshed". The motion *in limine* and Petitioner's objection were referred by the district judge to Magistrate Judge Joan Glazer Margolis. Id.

While the motion *in limine* and objection were pending, and before any decision was issued by the Magistrate Judge, on February 10, 1993 the Petitioner filed a second motion to enlarge the time for discovery, requesting leave to take out-of-state depositions "for purposes of a pretrial hearing on defendants' motion *in limine*". This second motion for enlargement was objected to by the Respondents and not ruled upon by the magistrate judge. App. 5A. The anticipated pretrial hearing was never conducted by the district court.

In her initial ruling on March 24, 1993, the magistrate judge adopted a four prong "safeguard test[1] for purposes of deciding the *in limine* motion, a component of which required corroborative evidence. The Petitioner was permitted to conduct the telephonic deposition of her hypnotist, Valerian St. Regis, who was then age 72, semi-retired, and residing in Alaska. *Borawick*, 842 F.Supp. 1505. The Petitioner's February 10, 1993 discovery motion to

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[1] The test required: 1) that the hypnotist be appropriately qualified; 2) that he or she avoid adding new elements to the subject's description 3) that a permanent record be available to ensure against suggestive procedures; and 4) that other evidence to corroborate the "hypnotically enhanced" testimony be offered.

take other depositions was not ruled upon by the Magistrate Judge. App. 5A.

The Petitioner filed written submissions, the videotaped deposition of the hypnotist, and the following corroborative evidence by expert affidavit: 1) an affidavit from Dr. Hirsch who treated the Petitioner after she began to recollect the sexual abuse; 2) an affidavit from Dr. Waldschmidt, the psychologist who also treated her after she began to recollect the sexual abuse; 3) and an affidavit from a clinical psychologist, Anthony Reading, Ph.D., who treated her in 1987, before the Petitioner regained her memories of child sexual abuse and before the hypnosis. Id. at 1506, n.1. All three affidavits opined that the Petitioner exhibited the characteristic traits and symptoms of a victim of incest and child sexual abuse. Dr. Waldschmidt further opined that the Petitioner met the DSM-III diagnoses for Psychogenic Amnesia, Post-traumatic Stress Disorder, and Dissociative Disorder Not Otherwise Specified

The hypnosis occurred months, and with respect to some memories, years before the memories emerged. In his videotaped deposition, the hypnotist, Valerian St. Regis, testified that he had 10-12 hypnosis sessions with the Petitioner over a one year span from July of 1987 until fall of 1988 for the treatment of chronic illness and stress. During the last 3 sessions he used the hypnotic technique of age regression, taking the Petitioner back to her childhood. Id. 1507. While using regression, the hypnotist uncovered one incident of sexual abuse pertaining to the Petitioner's deceased father, and others involving the Respondents. Before and after these hypnosis sessions, the Petitioner had no conscious recollection of sexual abuse. App. 3A. The Petitioner left the sessions with no recollection of what transpired. App. 4A.

The hypnotist, St. Regis, further testified that he had over 50 years off and on experience in the use and study of hypnosis, had received a degree from the American Institute of Hypnotherapy in Santa Ana, California, was a member of the American Association of Professional Hypnotherapists, was registered in the 1993 National Register of Professional Hypnotherapists, had

attended numerous lectures on the subject of hypnosis, had lectured to court personnel at the U.S. Bankruptcy Court for the District of Alaska on the subject of hypnosis for stress management, and lectured to psychology classes at the University of Alaska. In 1987 St. Regis was hired by the Pacific Medical Center in Los Angeles, where he worked under the supervision of Ronald Peters, M.D., a licensed medical doctor, and where he treated the Petitioner. St. Regis further testified that on the three occasions when he used hypnotic age regression on the Petitioner, he did not use any suggestions and asked: "what happened?", "what do you remember?", "what do you recall?". App. 4A.

Without ruling on Petitioner's February 10, 1993 discovery motion which sought leave to conduct depositions, and without conducting an evidentiary hearing, the magistrate judge issued a supplemental ruling on May 26, 1993 recommending granting Respondents' motion *in limine* on the ground that the hypnotist was not "appropriately qualified". The magistrate judge also concluded: "...[t]here is no need to address the issue of corroborative evidence". App. 9A. The initial and supplemental rulings made two factual findings, not objected to by the Respondents: 1) "that hypnosis was appropriate for the memory loss involved"; and 2) "based upon St. Regis' deposition testimony, there is no indication that St. Regis added new elements to Plaintiff's description while under hypnosis". App. 8A-9A.

While Petitioner's objections to the magistrate judge's initial and supplemental rulings were pending before the district judge, this court decided *Daubert v Merrell Dow Pharmaceuticals*, 113 S. Ct. 2786 (1993). The Petitioner moved for reconsideration of the in limine rulings because of the magistrate judge's reliance upon forensic hypnosis precedents relying upon the *Frye*[2] test for the admissibility of scientific evidence. The motion for reconsideration argued that the therapeutic hypnosis satisfied *Daubert*, without the imposition of additional safeguards as a precondition to the admissibility of testimony chronologically following its use. App. 6A. As additional corroboration, the

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[2] Frye v United States, 293 F. 1013 (D.C. Cir. 1923).

Petitioner submitted, in accordance with Fed. R. Evid. 104a, two letters received from her younger sister in 1989, and predating the lawsuit by more than two years. Both letters referenced sexual assaults of the younger sister, and one expressly identified the Respondents as the perpetrators. App. 6A. The Petitioner also submitted additional expert affidavits, one from a board-certified psychiatrist, Matthew Klein M.D., and one from a clinical and forensic psychologist, Anne Pratt, Ph.D., both of which stated that the therapeutic use of hypnosis is widely accepted in the mental health community. App. 6A. The affidavits further stated that it was not common in the mental health therapeutic community to videotape or audiotape therapeutic sessions, as such could itself be highly suggestive. At no time did the Respondents offer *any* expert affidavits in support of their motion *in limine*.

Upon reconsideration, the magistrate judge adhered to her earlier ruling barring the Petitioner from testifying in her own case. App. 6A. The district court judge adopted the magistrate judge's recommendations, and the Respondents moved for summary judgment. App. 6A-7A. In recommending summary judgment, the magistrate judge commented: "this result is an unfortunate one in that plaintiff apparently has been unable to develop any independent evidence (such as the testimony of her sister) to corroborate her claims". App. 45A. Upon receipt of this ruling, the Petitioner then filed another motion to reopen discovery and renewed her motion to reopen discovery dated February 10, 1993. The motion was supported by an affidavit of the Petitioner recounting how her sister had, "on at least twenty occasions from 1989 through 1993" told the Petitioner she was violently sexually assaulted by the Respondents' and that a third family member also informed the Petitioner that she had been sexually abused by the Respondent Morrie Shay. The motion to reopen was retained by the district judge, and denied. Final judgment was entered in favor of the Respondents and appealed to the United States Court of Appeals for the Second Circuit. App. 7A.

The court of appeals recognized the issue before it was left undecided by this Court in *Rock v Arkansas*, 484 U.S. 44 (1987), acknowledging *Rock*, "explicitly limited the reach of its holding

by refusing to express an opinion as to the appropriate rule of admissibility 'of testimony of previously hypnotized witnesses other than criminal defendants'." App. 18A, quoting *Rock*, 484 U.S. at 58, n.15. The court of appeals also acknowledged the conflict of authority in those cases where hypnosis is used as a forensic or investigative tool: "[t]he state and federal courts that have been faced with the admissibility of hypnotically-refreshed testimony have followed four different approaches". App. 16A-21A. The court of appeals noted that "the law continues to be in a state of flux regarding the reception of hypnotically-enhanced testimony". App. 21A.

The court of appeals recognized that even in the forensic context, when hypnosis is used for investigative purposes for the events being litigated, "some courts treat all such testimony as admissible under the theory that hypnosis does not render the witness incompetent, but goes to the question of credibility", citing among other cases, the Ninth Circuit's decision in *Kline v Ford Motor Co.*, 523 F.2d 1067 (9th Cir. 1975), a civil case where investigative hypnosis was used. App. 16A. Despite this conflicting authority, the court of appeals nonetheless adopted a "nonexclusive" multi-factored approach which it claimed was similar to that adopted by the Eighth and Fourth Circuits and the Idaho Supreme Court in cases all decided before this court decided *Rock* and *Daubert*.

The test adopted by the court of appeals included consideration of a "non-exclusive" set of factors, some of which it listed: 1) an evaluation of the purpose of the hypnosis, whether investigative or therapeutic; 2) whether the subject received any suggestions from the hypnotist or others prior to or during the hypnosis; 3) the presence or absence of a permanent record, which can help the court ascertain whether suggestive procedures were used, ideally the sessions should be videotaped or audiotaped; 4) whether the hypnotist was appropriately qualified by training in psychology or psychiatry; 5) whether corroborating evidence exists to support the reliability of the hypnotically refreshed memories; 6) evidence of the subject's hypnotizability may also be relevant; and 7) consideration of expert evidence offered by the parties as to the reliability of the procedures used.

App. 26A-27A.

The "nonexclusive" test adopted by the court of appeals, permitted review of the *content* of the Petitioner's memories of sexual abuse. The court of appeals determined, without viewing the facts in the light most favorable to the Petitioner on review of a summary judgment, that the Petitioner's recollections of multiperpetrator abuse concerning individuals outside of the case were "fanciful" and "far-fetched". App. 29A-30A. The district court conducted no Fed. R. Evid. 412 rape shield hearing to determine the relevancy of these allegations involving nonparties and unrelated to the hypnosis. The court of appeals assessed the credibility of the claims in applying its test and concluded: "[t]hat Borawick has made these *far-fetched*, uncorroborated accusations against others, in addition to the defendants, erodes our confidence in the allegations against Morrie and Christine Shay and properly *weighs* against the admissibility of her hypnotically-induced memories". Id. Although finding that "it would have been more appropriate for the district judge to have conducted an evidentiary hearing prior to issuing his ruling", the court of appeals did not remand Petitioner's case to the district court to allow her to meet its test or for a rape shield hearing. App. 28A.

The Petitioner filed a petition for rehearing and suggestion for rehearing en banc with the court of appeals with an addendum including: 1) a redacted affidavit from a third victim, dated September 6, 1994, obtained while this case was pending in the court of appeals, stating that the affiant was sexually assaulted by the Respondent Morrie Shay at age nine (App. 62A); 2) a Christmas card received by the Petitioner from her younger sister in December of 1994 with a postscript stating "Uncle Morrie and Aunt Chris did rape me when I was little also Joan, and I do not care if they disown me or hate me, your sister [name omitted]" (App. 66A); 3) a newspaper article from August 9, 1973 about the Petitioner's father, entitled *Lawyer Charged With Negligent Homicide in Sumner Girl's Death*, Enumclaw Courier-Herald, (App. 67A); and other information. The court of appeals denied the petition for rehearing and suggestion for rehearing en banc on December 29, 1995.

REASONS FOR GRANTING THE PETITION

I. CERTIORARI SHOULD BE GRANTED TO DECIDE A QUESTION LEFT UNDECIDED BY *ROCK V ARKANSAS* AND TO SETTLE A CONFLICT AMONG CIRCUITS IN LIGHT OF THIS COURT'S DECISIONS IN *ROCK* AND *DAUBERT V MERRELL DOW PHARMACEUTICALS*

As the Second Circuit acknowledged, its decision in this case was left undecided by this Court in *Rock v Arkansas*, 484 U.S. 44, 58, n.15 and conflicts with the Ninth Circuit's decision in *Kline v Ford Motor Co.*, 523 F.2d 1067 (9th Cir. 1975) and with *United States v Waksal*, 539 F.Supp. 834, (S.D. Fla. 1982), *rev'd on other grounds*, 709 F.2d 653 (11th Cir 1983). App. 18A and 16A.

Left undecided by *Rock* are the circumstances under which individuals who have previously been hypnotized for therapeutic purposes, can testify in civil cases. Anyone who has undergone any form of therapeutic hypnosis may now have their ability to testify called into question. All witnesses testify from memory and "[b]y definition, trials are based on memories of the past". *Franklin v Duncan*, 884 F. Supp. 1435, 1438 (N.D. Calif. 1995). The implications of the court of appeal's decision are vast, disenfranchising many who have undergone therapeutic hypnosis, professionals who use hypnosis, victims of sexual abuse, victims of violent crimes, and other members of the public. Unlike the forensic precedents relied upon by the court of appeals, the Petitioner did not have any "refreshed recollection" of the sexual abuse for weeks, months, and with respect to some events, years, following the hypnosis.

In *Rock,* the Petitioner was charged with the shooting death of her husband and hypnotized for investigative purposes. In declaring unconstitutional the State of Arkansas' per se rule excluding hypnotically refreshed testimony, this court recognized a previously hypnotized criminal defendant's right to testify in under the Due Process Clause of the Fourteenth Amendment, and the Fifth Amendment's privilege against self-incrimination. *Rock* held: "[a]t this point in our development of our adversary system,

it cannot be doubted that a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense". *Rock*, at 49. *Rock's* holding was limited to instances where hypnosis was used as an investigative tool to refresh the recollection of a criminal defendant: "[t]his case does not involve the admissibility of testimony of previously hypnotized witnesses other than criminal defendants and we express no opinion on that issue". *Id.* at 58, n.15. This Court did significantly note, however, that the right to testify "reaches beyond the criminal trial: the procedural due process constitutionally required in some extrajudicial proceedings includes the right of the affected person to testify". *Id.* at 52, n.9, *citing*, *Gagnon v Scarpelli*, 411 U.S. 778 (1973); *Morrissey v Brewer*, 408 U.S. 471 (1972); *Goldberg v Kelly*, 397 U.S. 254 (1970).

Hypnosis has been recognized as a valuable therapeutic tool for decades. The American Medical Association endorsed hypnosis as a valid therapeutic technique in 1958. *Rock*, 483 U.S. at 59. The American Psychological Association endorsed its use in 1960. Hypnosis is used, by psychiatrists, psychologists, professional hypnotists, hypnotherapists, habit control specialists, anesthesiologists, obstetricians, oncologists, dentists, nurses, educators, attorneys, chiropractors, marriage family and child counselors, parole and probation officers, clinical social workers, athletic trainers, ministers and members of the clergy. Scheflin and Shapiro, *Trance on Trial*, p.6 (Guilford Press 1989). It has at least 83 applications in medicine, including its use for the treatment of alcoholism, cancer, epilepsy, hypertension, and many other conditions. Hammond, *Hypnotic Induction & Suggestion: An Introductory Manual*, p. 98 (The American Society of Clinical Hypnosis 1989). It has 72 applications in psychology and psychiatry and 17 uses in dentistry. *Id.* at 99-100. In addition, self-hypnosis tapes are widely available to the public in many bookstores as are self-hypnosis manuals. Hammond, *Manual For Self-Hypnosis*, (The American Society of Clinical Hypnosis 1989).

Coinciding with the widespread use of therapeutic hypnosis is the increased legal and societal concern over the prevalence of child sexual abuse. Bowman & Mertz, *A Dangerous Direction:*

Legal Intervention In Sexual Abuse Survivor Therapy, 109 Harv. L. Rev. 549, 593 (1996). Noting the increasing societal concern, this law review article finds the imposition of third-party liability against therapists legally unsound. Since 1989 nineteen states have adopted special statutes of limitations for childhood sexual abuse tort actions and many other jurisdictions have tolled their statute of limitations to preserve claims for adults who have traumatic amnesia for the abuse. Comment, *Recovered Memories of Childhood Sexual Abuse: The Admissibility Question*, 68 Temple L. Rev. 249, 257 (1995)[3], also see, Kanovitz, *Hypnotic Memories and Civil Sexual Abuse Trials*, 45 Vand. L. Rev. 1185, 1202-1203 (1992). The Connecticut legislature, recognized the "unique problems associated with the tort of sexual abuse" (App. 40A), and extended the statute of limitations to age 35, to enable victims of incest and child sexual abuse time to come to terms with the abuse and seek civil redress. C.G.S.§52-577d.

The American Medical Association, in its November 6, 1995 statement entitled "Sexual Assault in America", recognized that "[s]exual assault is one of the most serious and fastest growing violent crimes in America. The National Victim Center reports that over 700,000 women are raped or sexually assaulted annually. Of these, 61% are under the age of 18". The often-cited study, *Rape in America: A Report To The Nation*, prepared by the National Victim Center and Crime Victims Research and Treatment Center, determined that the majority of American rape victims (61%) are raped before the age of 18, and an astounding 29% of all forcible rapes occurred when the victim was less than eleven years old. This study estimated that as many as 3.8 million adult American women have had rape-related post-traumatic stress disorder. *Rape in America: A Report To The Nation*, p.7 (April 23, 1992).

Sexual assaults upon our young have reached epidemic proportions. Studies indicate that between one fifth to one third of all women have experienced sexual abuse in childhood. Williams, *Recall of Childhood Trauma: A Prospective Study of*

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[3] See this Comment for a critic of the approach used by the district court, repeated in the same determinative fashion by the court of appeals.

Women's Memories of Child Sexual Abuse, Journal of Consulting and Clinical Psychology, Vol 62, No.4, 1167 (1994). This prospective study of 129 women with documented histories of childhood sexual abuse found 38% of the participants did not report the abuse seventeen years later, and another 16%, who did recall the abuse, stated at some point in the past they had forgotten about it. The phenomenon of psychogenic amnesia has been documented in other empirical studies as well. *Supra*, 109 Harv. L. Rev. at 597-609.

Psychogenic amnesia, post-traumatic stress disorder and dissociative disorder, all psychological disorders recognized by the American Psychiatric Association, and all experienced by the Petitioner, are common psychological coping mechanisms for victims of child sexual abuse and sexual assault. 109 Harv. L. Rev. at 597-603; 45 Vand. L. Rev. at 1203-1209. Children who are repeatedly abused automatically learn to put themselves in a trance state during the abuse. 109 Harv. L. Rev. at 560. Spontaneous hypnosis is a defensive, dissociative mechanism symptomatic of sexual abuse.

Hypnosis of children and others, coupled with threats and severe physical abuse, fall within the more severe abuse, deemed "ritual abuse". States which have enacted legislation against ritual child abuse, define the crime to include the forced ingestion of narcotics and hallucinogens used to induce a hypnotic state. For example, see Idaho Code §18-1506A, Illinois Code §5/12-33, Louisiana Rev. Statute §14:107.1, and Montana Code §45.5-627. App.53A-60A. If the court of appeals decision is left to stand, it will condone exclusion of the testimony of victims of child sexual abuse and ritual abuse because they are victims. It is doubtful that the perpetrators of these more severe forms of multidimensional child sexual abuse are audiotaping and videotaping the abuse, or that they possess the necessary qualifications.

There have been numerous scientific studies on the subject of hypnosis, memory, and psychogenic amnesia since this court decided *Rock*. Just as it was erroneous for the court of appeals to extrapolate forensic hypnosis case law into the therapeutic setting, it is scientifically unsound to extrapolate studies of normal

memory for hypnotized and nonhypnotized subjects to a patient population with traumatic, affect-laden memories. One crucial flaw with the 1985 American Medical Association's Council on Scientific Affairs Report cited in *Rock*, 483 U.S. at 59, is that the Council Report did not address the applications of hypnosis with memory in clinical situations involving abuse, or in forensic cases involving traumatic or highly affect-laden memory. Hammond, et al, *Clinical Hypnosis and Memory: Guidelines For Clinicians and For Forensic Hypnosis* (American Society of Ciinical Hypnosis Press, February 1995) (hereinafter "ASCH Guidelines").

The court of appeals, following forensic precedents pre-dating *Rock* and *Daubert*, erroneously relied upon a body of research performed by experimental researchers on *normal* memory for nonsense material, rather than studies on *traumatic memory* for significant, meaningful emotional memories. App. 10A-16A. Lacking any psychiatric expertise of its own, the court of appeals uncritically accepted the "constructionist" views of memory (App. 16A), without review of the studies conducted by trauma memory researchers. Brown, Scheflin & Hammond, *Memory, Trauma, Treatment & Law* (In Press). The flaw with the constructionist view is that the theory is derived from studies on normal memory processing and cannot readily be applied to traumatic memory. *Id.*

More current studies demonstrate that the majority of people in hypnosis, including highly hypnotizable subjects, do not mistake hypnotically suggested fantasies for actual events. ASCH Guidelines, p. 20. Also contrary to the common legal argument that hypnosis renders an individual immune to cross-examination, more recent studies also demonstrate that hypnotic techniques do not appear to immunize subjects against the effects of cross-examination. *Id.* at 22 citing Spanos et al., 1989; Spanos et al 1991. Significantly, it has been found that highly hypnotizable persons *in hypnosis* were no more vulnerable to the effects of leading questions than nonhypnotic highly hypnotizable persons. Sheehan, et al. (1993). In other words, the trait of hypnotizability was the distinguishing factor, not the hypnosis. Accordingly, there is a need for review by this court to assimilate more recent

scientific studies, post dating *Rock* so that lower courts do not mistakenly follow forensic precedents relying on research inapplicable to traumatic memory and decided under Frye.

Hypnosis is no more likely to contaminate memory than the ordinary processes recognized in eyewitness testimony, interrogative questioning, interviewing, or other aspects of suggestion already recognized by courts. ASCH Guidelines, p. 22 (1995). The ASCH panel concluded, based on the scientific evidence from numerous studies, "that contaminating effects on memory are no more likely to occur from the use of hypnosis than from many nonhypnotic interviewing and interrogative procedures. Therefore, legal rules that single out hypnosis for restrictive treatment are unwarranted". ASCH Guidelines, p. 22-23 (1995). The scientific literature supports a rule of admissibility for testimony chronologically following therapeutic hypnosis.

In the forensic setting, where hypnosis is used as an investigative tool, all Circuits have rejected a rule of per se inadmissibility[4] with the cases falling into one of three remaining categories: 1) the safeguard approach, considered insufficiently inflexible by the court of appeals (28A); 2) the totality-of-the circumstances approach, with varying factors of consideration; and 3) the *per se* rule of admissibility, which permits an individual to testify, be cross-examined or impeached on the fact of hypnosis, and allows introduction by both sides of expert testimony on the subject of hypnosis.

Even in a forensic context and in criminal cases where the confrontation clause has been invoked, a majority of the federal courts and many state courts hold post-hypnotic testimony admissible and allow the jury to determine its credibility and

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[4] The Second Circuit correctly noted that many courts adopting the per se inadmissible rule did so on the basis that the testimony does not meet the requirements of *Frye v United States*, 293 F. 1013 (D.C. Cir. 1923), and that this position is now called into question by *Daubert v Merrell Dow Pharmaceuticals*, 113 S. Ct. 2786 (1993), holding that the Federal Rules of Evidence supersede *Frye*. *Borawick*, 68 F.3d at 604, n.3. This view was followed in *Rowland v Kentucky*, 901 S.W.2d 871, 873 (Ky. 1995).

weight. 68 Temp. L. Rev. at 258. The Ninth Circuit has adopted a per se rule of admissibility, holding that the current recollections of witnesses whose memories have been refreshed by hypnosis are admissible, with the fact of hypnosis relevant to credibility and the weight to be given to the testimony by the trier of fact. This approach has been applied in civil and criminal cases. *United States v Awkard*, 597 F.2d 667 (9th Cir. 1979), *cert. denied*, 444 U.S. 885 (1979); *Kline v Ford Motor Company*, 523 F.2d 1067 (9th Cir. 1975); *Wyller v Fairchild Hill Corp.*, 503 F.2d 506 (9th Cir. 1974).

Before the Second Circuit's decision in this case, its only prior decision on the issue of the admissibility of post-hypnotic testimony, again used forensically in a criminal case, was *United States v Miller*, 411 F.2d 825 (2d Cir. 1969). In *Miller*, the Second Circuit adopted the common law rule that hypnosis was a subject for impeachment. *Id.* at 832. In its opinion in this case, the Second Circuit made no mention of its prior holding in *Miller*.

The First Circuit in *Clay v Vose*, 771 F.2d 1 (1st Cir. 1985), *cert. denied*, 475 U.S. 1022 (1986) held that the prior use of hypnosis on a witness goes to the weight to be given the testimony rather than its admissibility. Even in the criminal context, the First Circuit found no confrontation clause violation where the jury was permitted to assess the credibility of the previously hypnotized witness. *Id.* at 4. The Third Circuit, in *Chaussard v Fulcomer*, 816 F.2d 925 (3rd Cir.1987), *cert. denied* 484 U.S. 845 (1987), on review of a petition for writ of habeas corpus, found no error in the admission of testimony of a previously hypnotized rape victim, and held that the loss of notes and the police department's destruction of a tape recording of the session did not result in the denial of the prisoner's Sixth Amendment right to confrontation or due process rights.

The Sixth Circuit, in *Beck v Norris*, 801 F.2d 242 (6th Cir. 1986), (applying Tennessee law) properly treated the issue as one of competency and concluded the use of testimony of a previously hypnotized witness did not deprive the defendant of a fair trial, right of confrontation or effective assistance of counsel. The

Seventh Circuit in *Armstrong v Young*, 34 F.3d 421, 429 (7th Cir.1994), *cert. denied*, 115 S.Ct. 1369 (1995) declined to adhere to a specific set of court imposed guidelines, holding a defendant's due process and Sixth Amendment rights were not violated by admission of a witness' posthypnosis identification testimony. *Id.* 428-430.

The view that hypnosis goes to the weight and credibility of the testimony, not its admissibility, was also followed in *State v. Brown*, 337 N.W. 2d 138 (N.D. 1983); *Chapman v State*, 638 P.2d 1280 (Wyo. 1982); and more recently in *State v Evans*, 450 S.E.2d 47 (S.C. 1994). In the therapeutic context, and on point, the Colorado Court of Appeals held that a witness hypnotized for relaxation purposes was competent to testify. *People v McKeenan*, 732 P.2d 1238 (Colo. Ct. App. 1986), *cert. denied* 753 P.2d 243 (1988).

The Fourth, Fifth, Seventh, and Eighth Circuits, again in the forensic context, have adopted a case-by-case totality of the circumstances approach, but with less onerous standards than adopted by the court of appeals here. See, *White v Ieyoub*, 25 F.3d 245, 249 (5th Cir. 1994); *Armstrong v Young*, 34 F.3d 421, *cert. denied*, 115 S.Ct.1369 (1994); *McQueen v Garrison*, 814 F.2d 951 (4th Cir. 1987), *cert. denied*, 484 U.S. 944 (1987); and *Sprynczynatyk v General Motors Corp.*, 771 F.2d 1112, 1123 n.14 (8th Cir. 1985) *cert. denied* 475 U.S. 1046 (1986)[5]. In *White*, *Armstrong* and *McQueen*, the testimony was allowed. In

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[5] The court of appeals claimed the Eight Circuit adopted the "totality-of-the circumstances" approach (App. 20A), however, the Eighth Circuit, itself, in *Boykin v. Leapley*, 28 F.3d 788, 793-794 (8th Cir. 1994), characterized the test as applying "safeguards". The "safeguard" and "totality" tests are frequently confused or mischaracterized. A "safeguard" approach would imply a mandatory set of standards, whereas a "totality" approach would imply balancing various factors on a complete record at or near the time of trial, with the failure to meet one or more factors not determinative of the issue. Here the court of appeals applied its test in a determinative "safeguard manner".

White, a case overlooked by the court of appeals[6], the Fifth Circuit found no constitutional violation in the admission of a witness' posthypnosis identification testimony after being hypnotized by a police hypnotist. *White v Ieyoub*, 25 F.3d 248, n.17. In *McQueen*, the testimony was allowed where the hypnosis was performed by an amateur hypnotist. In *Sprynczynatyk*, the Eighth Circuit remanded for purposes of an evidentiary hearing.

By comparison, the Petitioner's case represents an unusual instance of a federal appellate court upholding wholesale exclusion of a litigant's testimony without a trial or hearing. The court of appeals erroneously excluded the Petitioner's testimony applying its "totality of the circumstance test" in a safeguard manner:

1) The first factor involved an evaluation of the purpose of the hypnosis, whether investigative or therapeutic. This factor militated in favor of the admission of the Petitioner's testimony, the hypnosis was therapeutic.

2) The second factor considered whether there were any suggestions from the hypnotist or others prior to or during the hypnosis. This factor also militated in favor of admission of the Petitioner's testimony. App. 27A. A finding was made that the hypnotist did *not* add new element's to the Petitioner's memory. App. 9A.

3) The third factor involved the presence or absence of a permanent record, which can help the court ascertain whether suggestive procedures were used. The court stated that ideally the sessions should be videotaped or audiotaped. The court of appeals applied this factor in a determinative manner when in no way insures the reliability of the hypnotic procedure or the posthypnotic testimony. App. 27A.

4) The fourth factor considered whether the hypnotist was

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[6] The only Fifth Circuit opinion cited by the court of appeals was *United States v Valdez*, 722 F.2d 1196 (5th Cir. 1984). The Fifth Circuit has since relaxed its strict view on hypnosis. See, *White v. Ieyoub*, 25 F.3d at 247.

appropriately qualified by training in psychology or psychiatry. The court of appeals erred in placing undue emphasis on "a general presumption in favor of appropriate academic credentials". App. 28A. The academic credentials of the hypnotist are not the key to minimizing suggestibility. Instead, the critical means of minimizing suggestibility, and thereby assuring reliability, is the use of nonleading questions in the manner performed by the hypnotist. The requirement that the hypnotist be appropriately qualified by "training in psychiatry or psychology" will bar the testimony of the many individuals hypnotized by licensed social workers, dentists, pain specialists, physical therapists, rehabilitation specialists, hypnotherapists, the clergy, those medical doctors not having "training in psychiatry or psychology", and other professionals, from using hypnosis as a therapeutic tool. Rather than considering the appropriate expert fit (ie. that the hypnotist was capable of performing the hypnosis and did not add new elements to the petitioner's memory), the court of appeals found academic credentials, rather than practical experience, to be determinative.

5) The fifth factor considered the existence of corroborating evidence. The petitioner did offer corroboration, including affidavits from three experts, one prehypnotic, that she exhibited the characteristic traits and symptoms of a victim of incest. In addition, the petitioner offered letters received from her sister, and predating the lawsuit by two years, stating the sister was sexual abused by the Respondents, an affidavit from a third victim stating that the affiant was sexually assaulted at the age of nine by the Respondent, Morrie Shay, and a card received by the Petitioner from her sister in December of 1994, stating: "Uncle Morrie and Aunt Chris did rape me when I was little also Joan, and I do not care if they disown me or hate me". App. 66A.

Although the petitioner offered corroboration, the court of appeals erred in making it a precondition to testifying. Corroboration is no more an indicia of reliability for the hypnotic procedure, than it is an indicia of reliability for purposes of determining the admissibility of hearsay statements in child sexual abuse cases. The precondition of corroboration was rejected in *Idaho v Wright*, 497 U.S. 805 (1990), where corroborative

evidence was "irrelevant to a showing of the 'particularized guarantees of trustworthiness' necessary for admission of hearsay statements under the confrontation clause". Corroboration is a question of proof of the underlying allegations to be ascertained at the time of trial. The absence of corroboration should not bar the testimony, nor should it prove the non-occurrence of the abuse. See, *supra*, 68 Temple L. Rev. 249, 278 (1995). "Otherwise, victims would have no remedy in cases where the abuse is non-violent or occurs in a private setting, making corroboration more difficult to obtain". *Id.*

6) The sixth factor involved consideration of evidence of the subject's hypnotizability. There are a number of scientific scales and tests developed for measuring hypnotizability, among them the Harvard Group Scale and the Stanford Hypnotic Suggestibility Scale. See, *supra*, 45 Vand. L. Rev. 1185, 1238, n.227 (1994). The problem with this factor is that hypnotizability is a measure of an individual trait which has no bearing on the reliability of the hypnotic procedure. A trait of high hypnotizablity may result in barring otherwise reliable testimony. Moreover, to even apply the tests of hypnotizability a witness must be hypnotized, jeopardizing his or her legal right to testify in the process! Even if hypnotizability were relevant to the reliability of the hypnotic procedure, the court of appeals failed to remand for purposes of allowing the Petitioner to be tested.

7) The seventh factor involved consideration of expert evidence offered by the parties as to the reliability of the procedures used. Again, the court of appeals failed to remand for this purpose.

In addition, the court of appeals erroneously considered as one of its "nonexclusive" factors an assessment of the credibility of the petitioner's memories of sexual abuse. App. 29A-30A. The court of appeals held that "[o]ur conclusion is reinforced by the *inherent incredibility* of Borawick's allegations. In this case, Borawick has levelled fanciful accusations of sexual abuse against numerous persons other than the defendants in this matter that include persons familiar and unfamiliar to her". Incredibly, the court of appeals detailed in its published opinion information filed

under seal by the Respondents. Beyond question, the court of appeals evaluated the credibility of Petitioner's claims involving others outside of the case, concluding: [t]hat Borawick has made these *far-fetched*, uncorroborated accusations against others, in addition to the defendants, erodes our confidence in the allegations against Morrie and Christine Shay and *weighs* against the admissibility of her hypnotically-induced memories". *Id.*

It is the function of the jury alone, not an appellate court, to evaluate the credibility of a witness. 27 C. Wright & Gold, *Federal Practice & Procedure: Evidence* §6005, at 39. This principle carries particular force in a case, such as this one, where the witness is the alleged victim and a party to the lawsuit. *Hoult v Hoult*, 57 F.3rd 1 (1st Cir. 1995). In the instant case, the court of appeals erroneously sanctioned a credibility assessment in a summary judgment context, on an incomplete appellate record with discovery left undone. When the validity of memory is contested, it is the role of the jury, not appellate courts, to assess credibility: "[a]fter direct and cross examination, after consideration of extrinsic evidence that tends to corroborate or contradict the memory, the focus must be on the credibility, the believability, the truth of the asserted memory". *Franklin v Duncan*, 884 F. Supp. 1435, 1438 (N.D.Cal. 1995). Not only is assessment of credibility a function of the jury, but a party should not be forced to try a case on an incomplete appellate record.

In making its credibility determination, the court of appeals erroneously concluded that transgenerational multiperpetrator and ritual child abuse is "fanciful" and "far-fetched". Yet the very type of conduct referred to in the court's opinion (App. 29A-30A) and the sealed portion of the record has received specific legislative recognition in California, Idaho, Illinois, Louisiana, and Montana, all states which have enacted legislation to deter ritual abuse crimes. See, App. 51A-61A. The Illinois statute, for example, defines ritual child abuse, among other things, as the forced ingestion of animal blood and includes the forced ingestion of narcotics or hallucinogens to induce a hypnotic state. See, Illinois Code §5/12-33, California Penal Code §667.83, Idaho Code §18-1506A, Louisiana Rev. Statute §14:107.1, and Montana Code §§27-2-217 and 45.5-627. App. 51A-61A.

Psychological manipulation, the misuse of hypnotic drugs and hypnosis are all conduct characteristic of ritual child abuse. Thus, it is all the more critical that post-hypnotic testimony be admissible to deter this type of criminal activity. If victims testimony is barred because of the inability to meet cumbersome, and in the ritualistic context impossible, tests of admissibility, the perpetrators will be immune from prosecution and liability.

Despite the court of appeal's incredulity, there are numerous reported examples of ritual crimes. Recently, in Prescott Ontario fifty-five adults in a multigenerational network were charged with the repeated violation of hundreds of individuals, 145 of whom were children and 80 who were adult. At least 16 of the accused were found guilty and 20 plead guilty. Kent, *Diabolic Debates: A Reply to David Frankfurter and J.S. La Fontaine*, Religion 24, 396 (1994). In November of 1994, the New York Times reported that a three month old boy was stabbed to death in a Quebec village during a ritual. See, *Quebec Boy Was Target of Cultists*, The New York Times, November 20, 1994, Sec. 1, p.19, col.1. This incident was proceeded by a mass murder ritual suicide of 53 members of a religious sect in Switzerland in October of 1994 and another 16 deaths in December of 1995 in eastern France linked to the Order of the Solar Temple, a cult which mixes elements of Christianity, astrology and the Order of the Knights of Templar. See, *Cult Horror Maims Prominent French Family*, The New York Times, December 27, 1995 at A9, col. 1.

Reported cases of cult and ritualistic activity can be found at *Commonwealth v Drew*, 489 NE2d 1233 (Mass. 1986); *State v Naylor*, 474 N.W.2d 314 (Minn. 1991); *McCorkle v Johnson*, 881 F.2d 993 (11th Cir. 1989)(denying a prisoner the right to conduct rituals involving the drinking of blood); *Childs v Duckworth*, 705 F.2d 915 (7th Cir. 1983)(denying a prisoner the right to conduct rituals with candles and incense in his cell); *Howard v United States*, 864 F. Supp. 1019 (D. Colo. 1994) (upholding the right of a prisoner to perform religious rituals using candles, incense, a gong, a black robe, and a chalice); *Aquino v Stone*, 957 F.2d 139 (4th Cir. 1992) (Privacy Act appeal filed by Lieutenant Colonel Michael Aquino, founder of the Temple of Set, a satanist religion, after his discharge from the

U.S. Army Reserves following a criminal investigation into charges of child sexual abuse at the Child Development Center at the Presido), also see 18 A.L.R. 5th 804 (1995).

Significantly, *the Petitioner's memories concerning these nonparties were not uncovered in the hypnosis* but nevertheless were considered by the court in weighing against the admission of the Petitioner's posthypnotic testimony. The recollections pertaining to nonparties referred to at Appendix 29A-30A were not uncovered during the hypnosis[7]. The whole purpose of the Federal Rape Shield Statute, Fed. R. Evid. 412 (App. 48A), is to protect *victims* and *alleged victims* of sexual assault from any prejudice cast by being a victim of multiple assaults. The Petitioner was prejudiced by the court of appeal's complete incredulity of these unrelated events.

The court of appeals applied it's "totality of the circumstances" test in a determinative safeguard manner with its decision turning on four factors: 1) the hypnotist's qualifications; 2) the absence of a permanent record for the procedures used; 3) the court's perceived discomfort with the fact that the hypnotist may have read excerpts from the petitioner's deposition prior to testifying himself. (App. 29A); and 4) the court's disbelief in unrelated claims of mulitperpetrator abuse. The perceived weaknesses in the hypnotist's qualifications and the absence of a

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[7] The court of appeals made reference to an incident of sexual assault involving men who the Petitioner "believed to be members of the Masons" (App. 29A). Certainly, the fraternal affiliations of these individuals has little to do with whether the sexual assault took place. When a Catholic priest, Father James Porter, is capable of sexually abusing 68 people over a 34 year span (68 Temple L. Rev. 249, 251, n.17), it is equally plausible that pedophiles can infiltrate Masonic and other fraternal organizations as a cover for their criminal activities. Sex offenders are of all walks of life and individual members of fraternal organizations are not above criminal acts. For an example of a lawyer, and former Grand Master, found guilty by the Grand Lodge for misappropriation of funds and "un-Masonic conduct" under the Masonic Code of Trials see, ***Rutledge v Gulian***, 459 A.2d 680 (N.J. 1983). The court of appeals erred in assuming the events did not occur and weighing such assumption on review of a motion for summary judgment. Here, the Petitioner's father was a lawyer and judge, facing felony charges at the time of his death.

permanent record should, like all other factors, be areas of inquiry for cross-examination, not preconditions to the admissibility of the testimony. Experts are commonly called upon to review the procedures of others in the absence of videotapes, audiotapes, or verbatim records. Relying upon the absence of a permanent record as determinative, this factor seeks to evaluate the credibility of the hypnotist, as if his sworn deposition testimony is valueless.

In addition, the court record more accurately reflects that the hypnotist was not provided a copy of the petitioner's deposition, but rather a copy of the Petitioner's objection to the Respondent's motion in limine. This objection was filed in 1992, four years after the hypnosis sessions ended. It is inconceivable that the objection could in any way have tainted the hypnotic procedure. The court of appeals lost sight of the central issue, the reliability of the hypnotic procedure as established by the express findings of the district court that hypnosis was appropriate for the memory loss involved and the hypnotist added no new elements to the Petitioner's memories.

The issue in this case is of compelling importance to the petitioner and the public, presenting itself as a timely opportunity to decide an issue left undecided in *Rock,* and to resolve a conflict among the Circuits in light of *Rock* and *Daubert*. The need for guidance by this court is critical for the many professionals who use hypnosis, for victims of child sexual abuse and other violent crimes who can lapse into self-hypnotic states, and for *any civil litigant* who has undergone any form of therapeutic hypnosis and later wishes to testify in court. If the decision of the Second Circuit is allowed to stand, those who commit child sexual abuse and ritual abuse crimes will take solace in the fact that heinous abuse will be disbelieved, that victim's testimony will be completely excluded, and that there will never be a trial on the merits. If such claims are discredited without a trial or hearing and testimony is excluded "some of the most pathological abusers may be protected, ironically, by virtue of the egregious harm they inflict". 109 *Harv. L. Rev.* at 606. This is a dangerous precedent.

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE IMPORTANT FEDERAL CONSTITUTIONAL ISSUES

The court of appeals erred in concluding that Petitioner's Due Process and Seventh Amendment claims were without merit. App. 32A. The methodology used by the court of appeals to exclude the Petitioner's testimony violates the Fifth Amendment right to procedural and substantive due process, and her Seventh Amendment right to a jury trial. This being a civil case, the Respondents cannot invoke the Sixth Amendment confrontation clause so frequently relied upon in many state court precedents involving forensic hypnosis in criminal cases.

The Fifth Amendment provides: "No person shall... be deprived of life, liberty or property without due process of law." The Petitioner's testimony was excluded on an incomplete record without the Respondents ever offering expert testimony supporting their motion *in limine*, without the Petitioner being permitted to depose individuals other than her hypnotist once the motion *in limine* was filed, without an evidentiary hearing, and without the rape shield protection afforded by Fed. R. Evid. 412. Worse yet, the court engaged in a credibility assessment.

The Petitioner has a liberty interest in not being sexually violated[8]. Indeed this Court has on many occasions recognized the fundamental due process liberty interests of an individual to bodily integrity and personal autonomy. *Cruzan v Director, MDH*, 497 U.S. 261, 278 (1990); *Roe v Wade*, 410 U.S. 113 (1973). The Petitioner also has a liberty interest in undergoing an approved treatment modality at the recommendation of her medical doctor and recognized by the American Medical Association since 1958. This court has recognized a liberty interest under the due process clause in the right to refuse medical treatment and a liberty interest in the right to seek a treatment of choice. See, *Cruzan, supra* 278; *Mills v Rogers*, 457 U.S. 291, 298 (1982). When liberty interests are at stake, due process is implicated. *Matthews v Eldridge*, 424 U.S. 319 (1976).

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[8] Congress recently gave legislative recognition to the right to be free from gender based crimes of violence by enacting 42 U.S.C. §13981(b). App. 50A.

The court of appeals also erred in violating the Petitioner's Seventh Amendment right to a jury trial. None of the state or federal criminal precedents involve a civil litigant's Seventh Amendment right to a jury trial. The Seventh Amendment reads: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law". The Seventh Amendment has also long been recognized as a fundamental guaranty of the rights and *liberties* of the people. *Hodges v Easton*, 106 U.S. 408 (1882); *Woodell v IBEW*, 502 U.S. 93 (1991). The Constitution itself commits the trial of facts in a civil cause in the federal system to the jury. *Edmonson v Leesville Concrete Co.* 500 U.S. 614, 624 (1991). Here, the Petitioner was forced to try her case before the court of appeals.

The court of appeals erred in assessing the Petitioner's credibility, and encroached upon the province of the jury. The court of appeals stated: "[t]hat Borawick has made these far-fetched, uncorroborated accusations against others, in addition to the defendants, erodes our confidence in the allegations against Morrie and Christine Shay and properly *weighs* against the admissibility of her (assumed by the court to be) hypnotically-induced memories" App. 30A. To permit appellate court judges to exclude evidence on the basis of credibility violates the Seventh Amendment right to a jury trial. 27 C. Wright & Gold, *Federal Practice & Procedure: Evidence* §6005, at 46. Summary judgment should not preempt the Petitioner's right to a jury trial where a question of material fact exists - whether the Respondents sexually assaulted her.

When Congress delegated rule making authority to this Court it declared that, "such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury at common law and as declared by the Seventh Amendment to the Constitution". 28 U.S.C.§2072. See also, *Beacon Theaters v Westover*, 359 U.S. 500 (1959). The Federal Rules of Evidence provide that "every person is competent to be a witness". Fed. R. Evid. 601. Rule 601 eliminates all grounds for witness

disqualification except for those described in Article Six of the Federal Rules of Evidence. Rule 601 converts all other competency issues into questions of witness credibility for the jury. There is nothing contained in the Federal Rules of Evidence, and specifically Article Six, or the constitution, which supports the result reached by the court of appeals or which would require the adoption of a special test of admissibility for Petitioner's testimony. In enacting C.G.S. §54-86h, the Connecticut legislature has deemed child victims of sexual abuse competent to testify: "No witness shall be automatically adjudged incompetent to testify because of age and any child who is a victim of assault, sexual assault or abuse shall be competent to testify without prior qualification. The weight to be given the evidence and the credibility of the witness shall be for the determination of the trier of fact". C.G.S.§54-86h, *supra*, p.4. Clearly, there exists a strong public policy in permitting victims of sexual abuse to testify so that cases may be tried on their merits.

The court of appeals erroneously confused a competency determination with an evaluation of credibility usurping the role of the jury, and violating the Petitioner's due process and Seventh Amendment rights in the process. Critical federal constitutional questions are involved, meriting the granting of this petition.

CONCLUSION

The petition for a writ of certiorari to the Court of Appeals for the Second Circuit should be granted.

THE PETITIONER,

BY

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(203) 740-0074

No. _____

In The

Supreme Court Of The United States

October Term, 1995

JOAN S. BORAWICK,

Petitioner

v.

MORRIE SHAY AND CHRISTINE SHAY,

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 690—August Term 1994

(Argued December 19, 1994 Decided October 17, 1995)

Docket No. 94-7584

JOAN S. BORAWICK,

Plaintiff-Appellant,

—v.—

MORRIE SHAY and CHRISTINE SHAY,

Defendants-Appellees.

Before:

VAN GRAAFEILAND, WALKER, and CABRANES,

Circuit Judges.

Plaintiff-appellant appeals from a final judgment entered on May 10, 1994 by the United States District Court for the District of Connecticut, (T.F. Gilroy Daly, *J.*), granting the defendants' motion for summary judg-

ment, following an in limine ruling prohibiting the plaintiff from testifying based on hypnotically-refreshed recollections of sexual abuse.

Affirmed.

HELEN L. MCGONIGLE, Brookfield, CT, *for Plaintiff-Appellant.*

CHARLES W. FLEISCHMANN, Bridgeport, CT (GULASH & FLEISCHMANN, Bridgeport, CT), *for Defendants-Appellees.*

WALKER, *Circuit Judge*:

This case presents an issue of first impression: the circumstances under which an alleged victim of sexual abuse may testify as to memories of abuse following therapeutic hypnosis. Plaintiff-appellant, Joan S. Borawick, appeals from a final judgment entered on May 10, 1994 by the United States District Court for the District of Connecticut (T.F. Gilroy Daly, *District Judge*), adopting the recommendations of Magistrate Judge Joan G. Margolis and entering summary judgment in favor of defendants, Morrie and Christine Shay, whom Borawick accused of sexually abusing her as a child. This judgment for defendants followed an in limine ruling prohibiting the plaintiff from testifying based on hypnotically-refreshed recollections of sexual abuse. *Borawick v. Shay*, 842 F. Supp. 1501, 1508 (D. Conn. 1994).

BACKGROUND

Borawick, who is currently thirty-eight years old and a citizen of California, brought a diversity tort action alleging that her aunt and uncle, Christine and Morrie Shay, Connecticut citizens, sexually abused her in the summers of 1961 and 1964, when she visited them at their home at the ages of four and seven, respectively. At the time, she lived in Seattle. Borawick had no memory of the alleged abuse for more than twenty years.

During the fall of 1984, Borawick began to experience panic attacks. When they continued, in the winter of 1985, she sought and received treatment on five or six occasions with a psychiatrist, Dr. Irwin Ruben. From April, 1986 through July, 1987, Dr. Anthony Reading, a clinical psychologist, continued the treatment. In the spring of 1987, she also sought medical treatment for chronic physical illness with Dr. Ronald Peters, a medical doctor and part owner of the Pacific Medical Center ("PMC") in Santa Monica, California. PMC's clientele was largely composed of people from the entertainment industry.

After reviewing Borawick's medical history of chronic illness, Dr. Peters referred Borawick to Valerian St. Regis, a hypnotist who worked under Peters's supervision, since "problems in childhood" sometimes cause chronic illness and are susceptible to recall through hypnosis. Borawick underwent twelve to fourteen hypnotic sessions with St. Regis from the summer of 1987 through the fall of 1988. Before and immediately following these sessions, she had no recollection of abuse, much less of any abuse by these defendants.

When deposed in 1993, St. Regis testified that he had no permanent records relating to the hypnosis of Borawick; however, prior to his deposition, he had read a portion of Borawick's deposition. St. Regis maintained that, before hypnotizing Borawick, he had no expectation of the type of information that the hypnosis would reveal. He explained that he used "regression therapy" to take Borawick back to the age of between three and five years old. St. Regis also testified that, in general, instead of using hypnotic suggestion with Borawick, he asked broad questions such as "what happened?," "what do you remember?," or "what do you recall?."

St. Regis testified that Borawick revealed under hypnosis that her aunt, defendant Christine Shay, persuaded Borawick, at age four, to strip and engage in "ritual dancing." St. Regis further stated that during hypnosis Borawick described anal object penetration by Christine Shay, as well as another incident in which her aunt inserted a "cap pistol in [Borawick's] vagina." St. Regis also testified that during hypnotic sessions, Borawick disclosed that her uncle, defendant Morrie Shay, anally raped her. St. Regis did not know whether the alleged anal rape involved penile insertion or object insertion.

St. Regis testified that he did not reveal to Borawick what she had described during the sessions, because, in his opinion, such revelations would have been "devastating" and would probably surface in time. Borawick attended her last session with St. Regis in the fall of 1988.

Borawick testified in her deposition that during the second week of February, 1989, several months after her final hypnotic session, she experienced her first non-hypnotic memory of sexual abuse by her father, who is

not a defendant in this case. Following this initial recollection, according to Borawick, subsequent memories surfaced in "bits and pieces." Her first memory concerning defendant Christine Shay allegedly occurred on February 10, 1989. On that date, Borawick first recalled her aunt vaginally raping her with a pistol. In late 1990 or early 1991, she first remembered an incident when Christine Shay forced "a broomstick into [Borawick's] vagina." Borawick also stated that she regained memory of being naked in the presence of her aunt and "having to dance around."

Borawick testified that her memory of being anally raped by defendant Morrie Shay surfaced in 1990. In addition to recalling sexual abuse by her father, aunt, and uncle, Borawick also claims sexual abuse by numerous others, including family members and her father's friends. More detailed references to these individuals and their various "rituals" and other alleged abusive conduct are described in the sealed portion of the appendix.

On January 24, 1992, Borawick commenced this action, seeking compensatory and punitive damages from Morrie Shay and Christine Shay for their alleged willful, wanton, and malicious sexual exploitation of her in 1961 and 1964. *Borawick*, 842 F. Supp. at 1501. Judge Daly denied plaintiff's motion to enlarge time for discovery on July 23, 1992. On November 4, 1992, defendants filed a motion in limine seeking to exclude the plaintiff's testimony. The in limine motion was referred to Magistrate Judge Joan Glazer Margolis. Borawick's second motion to enlarge time for discovery, filed on February 10, 1993, was not ruled upon.

After an initial ruling on March 24, 1993 that set forth the test the magistrate judge would follow in deciding

the in limine motion and after receiving further written submissions, the magistrate judge issued a supplemental ruling on May 26, 1993. The ruling recommended granting the defendants' motion in limine to exclude Borawick's testimony, principally on the ground that St. Regis was "not appropriately qualified." *Borawick*, 842 F. Supp. at 1508.

While Borawick's objections to the magistrate judge's initial and supplemental ruling were pending before the district judge, the United States Supreme Court decided *Daubert v. Merrell Dow Pharmaceuticals*, 113 S. Ct. 2786 (1993). Accordingly, the plaintiff moved for reconsideration of the in limine rulings on the ground that the therapeutic use of hypnosis and her resultant testimony satisfied *Daubert*. Borawick submitted as additional evidence copies of two letters purportedly received from her younger sister in 1989. Both referenced sexual assault against the sister, and one expressly identified the defendants as the perpetrators. Borawick also submitted two expert affidavits, one from a board-certified psychiatrist, Matthew Klein, M.D., and one from a clinical and forensic psychologist, Anne Pratt, M.D., as further support that the therapeutic use of hypnosis is widely accepted in the mental health community and is used for treatment of victims of sexual abuse. The defendants filed a reply and objection to plaintiff's objections, including a letter dated August 1, 1992, also allegedly written by the younger sister, that recanted her earlier allegations. Upon reconsideration, the magistrate judge adhered to her earlier recommended ruling. *Borawick*, 842 F. Supp. at 1509. On January 10, 1994, the district court adopted the magistrate judge's recommendation. *Id.* at 1501.

Shortly thereafter, the defendants moved for summary judgment. After the magistrate judge issued a recommended ruling granting the defendants' motion, the plaintiff refiled and the district court retained and denied a motion by Borawick dated February 10, 1993 to reopen discovery and to enlarge the time for taking depositions. On May 10, 1994, final judgment was entered in favor of the defendants. Borawick appeals from this judgment.[1]

DISCUSSION

Borawick raises the following claims on appeal: 1) the district court erred in granting the in limine motion because it applied the incorrect legal rule regarding the admissibility of hypnotically-refreshed testimony; 2) the district court's ruling was inconsistent with the holding in *Daubert v. Merrell Dow Pharmaceuticals*, 113 S. Ct. 2786 (1993); 3) the district court violated Borawick's right to a jury trial in granting the in limine motion, which resulted in a summary judgment in favor of the defendants; 4) the district court deprived her of due process in its rulings on Borawick's numerous motions.

I. Admissibility of Post-Hypnotic Testimony

This circuit has yet to address the admissibility of post-hypnotic testimony of memories elicited as a result of hypnosis. While numerous state and federal courts have considered this issue, nearly all of them dealt with recall in the context of hypnosis that was specifically intended to enhance a memory of a particular known or suspected occurrence. The parties have not cited, nor are

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[1] The Record on Appeal includes both an original record from the district court after oral argument and a supplemental record submitted pursuant to a stipulation approved by the district judge.

we aware of, any case concerning the specific issue before us: the admissibility of testimony about memories of childhood sexual abuse that are recalled for the first time in adulthood following the use of hypnosis as part of psychotherapy.

A. *District Court's Approach*

Judge Daly and Magistrate Judge Margolis were highly sensitive to the various concerns surrounding post-hypnotic testimony. The district court recognized that, although most of the caselaw concerns situations in which hypnosis was used to refresh a victim's or witness's memory of a crime or accident, the hypnosis in this case was used for therapeutic as opposed to investigative purposes. *Borawick*, 842 F. Supp. at 1503-05. Giving credence to Borawick's claim that her "psychological injuries caused by childhood sexual abuse are different than for victims of other torts, and that victims of sexual abuse may repress conscious memories of the abuse for years," the district court concluded that hypnosis is appropriate for the type of repression and loss of memory Borawick allegedly experienced. *Id.* at 1505.

Before testimony induced by hypnosis would be admissible, however, the district court determined that certain safeguards were necessary "not only to bolster a plaintiff's legitimate claims for childhood sexual abuse, but also to protect a defendant against devastating charges." *Id.* These safeguards were that 1) the hypnotist be appropriately qualified, 2) the hypnotist "avoid adding new elements to the subject's description," 3) "a permanent record be available to ensure against suggestive procedures," and 4) there be "other evidence to corroborate the hypnotically enhanced testimony." *Id.* The linchpin of the district court's ultimate decision to

exclude Borawick's testimony was its finding as to the first safeguard: that St. Regis was not qualified.[2] *Id.* at 1509 & n.5. The district court did not address the third element, but noted that St. Regis was not able to produce the reports that he claimed to have prepared contemporaneously. *Id.* at 1507. The district court suggested, however, that the second safeguard was met in that there was "no indication that St. Regis added new elements to plaintiff's descriptions while under hypnosis." *Id.* at 1508. Given these findings, particularly St. Regis's lack of qualifications, the district court saw no need to decide whether the corroborating evidence Borawick offered satisfied the fourth safeguard. *Id.* at 1508 n.5. With two of the four safeguards not met, the district court granted the in limine motion to exclude Borawick's testimony of sexual abuse.

B. *Borawick's Claims*

Borawick first contends that the district court erred in characterizing her recall of sexual abuse as hypnotically refreshed. Rather, she asserts, these memories may have "unfolded on their own" even without therapeutic hypnosis. Based on the timing and nature of the recollections, however, we discern no basis for disturbing the district court's finding that the memories were in fact refreshed by hypnosis.

The gravamen of Borawick's appeal is that even if her testimony were to be construed as post-hypnotic, the district court erred in adopting its legal test in requiring

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[2] The court initially found the record devoid of any information regarding St. Regis's qualifications and any safeguards he may have used in conducting the hypnosis of Borawick. Borawick was given the opportunity to supplement the record by deposing St. Regis and to offer any corroborating evidence. *Id.* at 1505.

both independent corroborating evidence and a permanent record of the hypnosis. She also argues that the district court clearly erred in concluding that St. Regis was not qualified as a hypnotist. Instead, Borawick argues, she should be deemed competent to testify under Federal Rule of Evidence 601, which reflects a strong presumption in favor of witness competency, and that this circuit should adopt a rule of per se admissibility of testimony related to memories following the use of hypnosis for therapeutic purposes.

C. *Standard of Review*

Before turning to the merits of this case, we address the appropriate standard of review. Borawick argues that because the exclusionary rule resulted in her inability to oppose the summary judgment motion, which led to her ultimate defeat on the summary judgment motion, we should review the challenge de novo. The Shays contend that because this is an evidentiary issue, the district court had broad discretion and we should therefore review its decision for abuse of discretion.

Our review must be de novo on the question whether, in exercising its discretion to admit evidence, the district court applied the proper legal test. *See A/S Dampskibsselskabet Torm v. Beaumont Oil Ltd.*, 927 F.2d 713, 716 (2d Cir.), *cert. denied*, 502 U.S. 862 (1991). We review the district court's finding that St. Regis was unqualified for clear error. *Id.*

D. *What is Hypnosis?*

While "[t]here is no single, generally accepted theory of hypnosis, [or] consensus about a single definition," Council on Scientific Affairs, "Scientific Status of

Refreshing Recollection by the Use of Hypnosis," 253 JAMA 1918, 1919 (1985) [hereinafter, Scientific Affairs], " 'there is considerable consensus at the descriptive level' as to how the [phenomenon] manifests itself in the hypnotized individual," 27 Charles A. Wright & Victor J. Gold, Federal Practice and Procedure: Evidence § 6011, at 116 (1990) [hereinafter Federal Practice] (quoting Orne, "On the Simulating Subject as a Quasi-Control Group in Hypnosis Research, What Why and How," in Hypnosis: Developments in Research and New Perspectives 519-21 (E. Fromm & R.E. Shor eds., 2d ed. 1979)). The American Medical Association has described hypnosis as a

> temporary condition of altered attention in the subject which may be induced by another person and in which a variety of phenomena may appear spontaneously or in response to [verbal] or other stimuli. These phenomena include alterations in consciousness and memory, increased susceptibility to suggestion, and the production in the subject of responses and ideas unfamiliar to him in his usual state of mind.

People v. Zayas, 546 N.E.2d 513, 515-16 (Ill. 1989) (alteration in original) (quotations omitted).

As early as 1958, the American Medical Association recognized hypnosis as a valid therapeutic technique. Council on Medical Health of the American Medical Association, "Medical Uses of Hypnosis," 168 JAMA 186, 187 (1958). It has been found useful in psychotherapy, in the treatment of psychosomatic illness, to alleviate pain or as a substitute for anesthesia, and for memory recall. *See People v. Hughes*, 59 N.Y.2d 523, 533; 466 N.Y.S.2d 255, 259 (1983); Jacqueline

Kanovitz, "Hypnotic Memories and Civil Sexual Abuse Trials," 45 Vand. L. Rev. 1185, 1210 n.101 (1992). Hypnosis has been credited with restoring lost memories that include repressed memories of painful experiences. Federal Practice, *supra*, § 6011, at 117; *see also* Kanovitz, *supra*, at 1225 & n.168 (1992). It has sometimes been useful in developing leads in criminal investigations. *See Harker v. Maryland*, 800 F.2d 437, 440 (4th Cir. 1986) (noting that "Dr. Martin Orne, a psychiatrist and frequent expert witness, believes that 'hypnosis may be useful in some instances to help bring back forgotten memories following an accident or a crime.' " (quoting Orne, "The Use and Misuse of Hypnosis in Court," 27 Int. J. Clinical & Experimental Hypnosis 311, 317-18 (1979))); *see Hughes*, 59 N.Y.2d at 533; 466 N.Y.S.2d at 259; Federal Practice, *supra*, § 6011, at 118-19. Despite these successes, many in the field remain skeptical of the reliability of hypnosis as a technique for refreshing or restoring memory. *Hughes*, 59 N.Y.2d at 533; 466 N.Y.S.2d at 259 (noting it provides "at best mixed results" in criminal investigations). Empirical studies calling into question the ability of hypnosis to restore memory effectively have engendered "considerable controversy" concerning the validity of using hypnosis for that purpose. Scientific Affairs, *supra*, at 1918. Thus, "[t]he popular belief that hypnosis guarantees the accuracy of recall is as yet without established foundation," *Rock v. Arkansas*, 483 U.S. 44, 59 (1987), and no consensus has been reached regarding the ability of hypnosis to enhance memory, Scientific Affairs, *supra*, at 1918.

The controversy over the effectiveness of hypnosis in memory enhancement centers in large part on disagreements concerning theories of memory. Those scientists

who are most optimistic about the role of hypnosis in memory recall conceptualize a process whereby the brain records and stores sensory input accurately, much like a videotape. Recall is the ability to "play back" that tape, and loss of memory is the inability to retrieve that information. *See Little v. Armontrout*, 819 F.2d 1425, 1429 (8th Cir.), *aff'd*, 835 F.2d 1240 (8th Cir. 1987) (en banc), *cert. denied*, 487 U.S. 1210 (1988); *Harker*, 800 F.2d at 439; *United States v. Valdez*, 722 F.2d 1196, 1200 (5th Cir. 1984); Scientific Affairs, *supra*, at 1920. Under this theory, hypnosis simply enhances the retrieval process.

Many scientists reject this theory, however. They view memory recall as "much more complex and much less accurate than previously thought." *State v. Tuttle*, 780 P.2d 1203, 1210 (Utah 1989), *cert. denied*, 494 U.S. 1018 (1990); *see* Scientific Affairs, *supra*, at 1920. Instead, they espouse a "construction theory" of memory, which holds that a memory is formed and influenced by numerous factors when the mind creates and integrates the information from an event "into the memory representation of that event." *Valdez*, 722 F.2d at 1200. The composite created by this process is malleable and evolves over time as additional input is received. In fact, a leading proponent of this theory has written that memory is " 'being continually remade [and] reconstructed in the interest of the present.' " F. Bartlett, Remembering 213 (reprint 1964) (1932), *quoted in Little*, 819 F.2d at 1429.

The "constructivists" are highly skeptical of any view that hypnosis can effectively and accurately enhance memory. They believe that because hypnosis has the power to contribute to memory reconstruction, it can create inaccurate memories. In other words, if present

events can contribute to a construction of a memory that differs from that which was originally perceived and if the process of hypnosis is such an event, then hypnosis may distort memory.

The courts have identified several problems with the reliability of hypnotically-refreshed recall. First, a person undergoing hypnosis becomes more susceptible to suggestion. The subject may be influenced by verbal and nonverbal cues, intentionally or unintentionally planted by the hypnotist. This suggestibility may be enhanced by the perception that hypnosis will refresh one's memory and by a wish to please the hypnotist. *See Rock*, 483 U.S. at 59-60; *Little*, 819 F.2d at 1429; *Hughes*, 59 N.Y.2d at 534-35, 466 N.Y.S.2d at 260; *State v. Hurd*, 432 A.2d 86, 93 (N.J. 1981).

In addition, a hypnotized person may "confabulate," that is, fill in the gaps in her memory to make it comprehensible. The added details may be derived from irrelevant or unrelated facts or from pure fantasy. *See Rock*, 483 U.S. at 60; *Little*, 819 F.2d at 1429-30. Like suggestibility, confabulation can occur as a result of the subject's desire to please the hypnotist by coming up with complete and coherent memories. *See Harker*, 800 F.2d at 440; *Pearson v. State*, 441 N.E.2d 468, 471 (Ind. 1982) (citing Levitt, "The Use of Hypnosis to 'Freshen' the Memory of Witnesses or Victims," *Trial*, April 1981, at 56); *Hughes*, 59 N.Y.2d at 535, N.Y.S.2d at 260.

A third problem with hypnotically-refreshed recall is "memory hardening," a phenomenon which gives the subject enhanced confidence in the facts remembered, whether they be true or false. *See Rock*, 483 U.S. at 60; *Harker*, 800 F.2d at 440; *Hughes*, 59 N.Y.2d at 535, N.Y.S.2d at 260 (describing experiments that demon-

strate this phenomenon). Even as inaccurate recollections increase, the subject's confidence is likely to remain constant or even to increase. In 1985 a leading scientific journal reported that no studies have shown "an increase in accuracy associated with an appropriate increase in confidence in the veracity of recollections." Scientific Affairs, *supra*, at 1921. The lack of correlation between the accuracy of recall and the subject's confidence in the accuracy makes it more difficult for a jury or even an expert to judge the credibility of hypnotically-enhanced testimony, *see Hurd*, 432 A.2d at 93-94, and makes cross-examination difficult, *Rock*, 483 U.S. at 60.

Finally, after undergoing hypnosis to refresh memory, individuals may lose the ability to assess their memory critically and be more prone to speculation than if they had relied only on normal memory recall. *Little*, 819 F.2d at 1430-31. The subject becomes less able "to discriminate between accurate and inaccurate recollections." Scientific Affairs, *supra*, at 1921. He or she may also experience "source amnesia," believing that a statement heard prior to hypnosis was a product of his or her own memory. *Little*, 819 F.2d at 1430.

As a result of the foregoing phenomena, the "hypnotically recalled memory is apt to be a mosaic of (1) appropriate actual events, (2) entirely irrelevant actual events, (3) pure fantasy, and (4) fantasized details supplied to make a logical whole." Bernard L. Diamond, "Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness," 68 Cal. L. Rev. 313, 335 (1980); *see* Scientific Affairs, *supra*, at 1921. In the worst case, someone who has undergone hypnosis might "inaccurately reconstruct the memory . . . and . . . then become convinced of the absolute accuracy of the recon-

struction through memory hardening." *Harker*, 800 F.2d at 441. The "constructionist" views, supported as they are in the scientific community, have considerable force. In our view, they cannot easily be discounted when the integrity of the judicial factfinding process is at stake, particularly when no study has shown that hypnosis used to refresh memory increases only accurate recall. Scientific Affairs, *supra*, at 1921.

E. *Various Approaches to the Admissibility Question*

The state and federal courts that have been faced with the admissibility of hypnotically-refreshed testimony have followed four different approaches. Some courts treat all such testimony as per se admissible under the theory that hypnosis does not render the witness incompetent, but goes to the question of credibility. *See, e.g.*, *Kline v. Ford Motor Co.*, 523 F.2d 1067, 1069 (9th Cir. 1975) ("That [a witness's] present memory depends upon refreshment claimed to have been induced under hypnosis goes to the credibility of her testimony not to her competence as a witness."); *United States v. Waksal*, 539 F. Supp. 834, 838 (S.D. Fla. 1982), *rev'd on other grounds*, 709 F.2d 653 (11th Cir. 1983); *Pearson*, 441 N.E.2d at 473; Federal Practice, *supra*, § 6011, at 123-24. This position depends in considerable part on one's faith in the jury's ability to evaluate the testimony accurately in light of cross-examination, expert testimony relating to hypnosis, and jury instructions. Federal Practice, *supra*, § 6011, at 124. Such an approach was particularly favored when courts were just beginning to address the admissibility of hypnotically-refreshed testimony, *see Tuttle*, 780 P.2d at 1208, but it "has sparsely been followed since 1980," *Zayas*, 546 N.E.2d at 516.

Courts at the other end of the spectrum have found that post-hypnotic testimony is per se inadmissible because the witness is incompetent to testify regarding such matters. *See, e.g., Zayas*, 546 N.E.2d at 518; *Tuttle*, 780 P.2d at 1211; *People v. Shirley*, 723 P.2d 1354, 1384 (Cal.), *cert. denied*, 459 U.S. 860 (1982). The common thread running through these cases is that the possible distorting effects of hypnosis on memory are impossible to circumvent and are so substantial that "the game is not worth the candle." *Shirley*, 723 P.2d at 1366. Worse yet, "hypnotism aggravates the unreliability of normal memory." *Valdez*, 722 F.2d at 1200 (referring to finding of California Supreme Court). Reasoning that no safeguard can adequately ensure reliability, these courts deem the evidence inadmissible.[3] *See Shirley*, at 641 P.2d at 1384. A number of courts apply a modified version of the rule by confirming the witness's testimony to matters recalled before undergoing hypnosis. *See, e.g., Tuttle*, 780 P.2d at 1211; *Hughes*, 59 N.Y.2d at 545; 466 N.Y.S.2d at 266.

In *Rock v. Arkansas*, 483 U.S. 44 (1987), the Supreme Court reviewed Arkansas's rule that a criminal defendant's hypnotically-refreshed testimony was per se inadmissible. While the Court recognized the problems with hypnosis, it concluded that certain procedural safeguards could reduce the potential inaccuracies of post-hypnotic

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[3] Many courts have taken this position on the basis that the testimony does not meet the requirements of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), since there is no general acceptance in the scientific community that hypnosis can reliably enhance memory. *See Tuttle*, 780 P.2d at 1209-10; *Hughes*, 59 N.Y.2d at 543, 466 N.Y.S.2d at 265; Federal Practice, *supra*, § 6011, at 132-33. This rationale is now called into question with the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals*, 113 S. Ct. 2786, 2793 (1993), holding that the Federal Rules of Evidence supersede *Frye*. *See* Federal Practice, *supra*, § 6011, at 8 (Supp. 1995).

testimony. *Id.* at 59-60. Focusing on the due process right of criminal defendants to testify in their own defense, *id.* at 51, the Sixth Amendment right to call witnesses in the defendant's favor, *id.* at 52, and the Fifth Amendment guarantee against compelled testimony, *id.* at 52-53, the Court concluded that the rule of per se inadmissibility was an "arbitrary restriction on the [criminal defendant's] right to testify in the absence of clear evidence by the State repudiating the validity of all posthypnosis recollections," *id.* at 61. Consequently, the Court deemed Arkansas's prohibition unconstitutional. The Court, however, explicitly limited the reach of its holding by refusing to express an opinion as to the appropriate rule of admissibility "of testimony of previously hypnotized witnesses other than criminal defendants." *Id.* at 58 n. 15.

The third and fourth approaches occupy a middle ground. These attempt to balance the competing concerns that animate the per se positions. The third approach, articulated by the New Jersey Supreme Court in the oft-cited *State v. Hurd*, 432 A.2d 86 (N.J. 1981), requires adherence to a list of prescribed safeguards intended to ensure the reliability of hypnotically-refreshed testimony. The court concluded that "a rule of per se inadmissibility is unnecessarily broad and will result in the exclusion of evidence that is as trustworthy as other eyewitness testimony." *Id.* at 94.

In light of recommendations offered by a frequent expert witness, Dr. Martin Orne, the court adopted the following procedural requirements:

> First, a psychiatrist or psychologist experienced in the use of hypnosis must conduct the session. This professional should also be able to qualify as

an expert in order to aid the court in evaluating the procedures followed. . . .

Second, the professional conducting the hypnotic session should be independent of and not regularly employed by the prosecutor, investigator or defense. . . .

Third, any information given to the hypnotist by law enforcement personnel or the defense prior to the hypnotic session must be recorded, either in writing or another suitable form. . . .

Fourth, before inducing hypnosis the hypnotist should obtain from the subject a detailed description of the facts as the subject remembers them [without] . . . asking structured questions or adding new details.

Fifth, all contacts between the hypnotist and the subject must be recorded. . . .

Sixth, only the hypnotist and the subject should be present during any phase of the hypnotic session, including the pre-hypnotic testing and the post-hypnotic interview.

Id. at 96-97 (footnote omitted).

The presence of these safeguards, however, was not sufficient in *Hurd* for the admissibility of post-hypnotic testimony. The trial court was also directed to assess the reliability and the admissibility of the testimony in light of the following non-exclusive list of considerations, *id.* at 96: "the kind of memory loss that hypnosis was used to restore and the specific technique employed," *id.* at 95, whether the memory loss in question is "likely to yield normal recall if hypnosis is properly administered," and "whether the witness has any discernible

motivation for not remembering or for 'recalling' a particular version of the events," *id.* at 96. Finally, the court held that the party attempting to admit the hypnotically-enhanced testimony bears the burden of demonstrating that the testimony is reliable based on the standards described. *Id.* at 97.

Several courts have followed the *Hurd* guidelines or adopted similar ones. *See State v. Weston*, 475 N.E.2d 805, 813 (Ohio App. 1984); *House v. State*, 445 So. 2d 815, 826-27 (Miss. 1984); *see also* Federal Practice, *supra*, § 6011, at 168.

Finally, the approach most frequently taken by the federal courts, Federal Practice, *supra*, § 6011, at 173, is a so-called case-by-case or totality-of-the-circumstances approach, *see, e.g.*, *McQueen v. Garrison*, 814 F.2d 951, 958 (4th Cir.), *cert. denied*, 484 U.S. 944 (1987); *Wicker v. McCotter*, 783 F.2d 487, 492-93 (5th Cir.), *cert. denied*, 478 U.S. 1010 (1986); *Sprynczynatyk v. General Motors Corp.*, 771 F.2d 1112, 1123 (8th Cir. 1985), *cert. denied*, 475 U.S. 1046 (1986). While recognizing the benefits of the *Hurd* guidelines, these courts conclude that the district court should be given discretion to balance all of the factors to determine the reliability of the evidence and the probative versus prejudicial effect of the testimony. They note that even though the safeguards required by other courts

> represent[ ] the type of general reliability inquiry that must be made[,] . . . a court cannot necessarily rest solely on the reliability *vel non* of the hypnosis procedures in ruling on the admissibility of the proffered testimony. Even though all of the *Hurd* safeguards might be employed, the defendant may still be able to demonstrate by expert testimony that a witness' memory has been irreparably distorted by

> hypnosis. On the other hand, even if the hypnosis procedures are flawed, a trial or appellate court might discern that a witness' testimony was nonetheless independent of the dangers associated with hypnosis.

McQueen, 814 F.2d at 958 (citations omitted). As the foregoing summary indicates, the law continues to be in a state of flux regarding the reception of hypnotically-enhanced testimony. *See* Federal Practice, *supra*, § 6011, at 123.

F. *Hypnosis as a Therapeutic Tool*

The existing caselaw concerning the admissibility of post-hypnotic testimony, while helpful to our analysis, is grounded in fact situations where the hypnosis is specifically directed to the witness's recollections of known events, rather than where repressed memories of past traumas previously unknown simply emerge following hypnosis. Borawick, relying heavily on a law review article, Kanovitz, *supra*, at 1213, argues that hypnosis functions differently and more reliably when it results in the retrieval of repressed memories of traumatic events than when it is used to refresh one's memory of eye-witnessed events and therefore testimony relating to the former should be admitted on a per se basis.

The research on hypnosis only uses subjects with normal memory function who are exposed to simulations of real-life events to "replicate eyewitness situations," *id.* at 1212, 1223, since for practical and ethical reasons, it is impossible to design effective controlled studies to test the ability of hypnosis to retrieve accurate, suppressed memories of childhood trauma, *id.* at 1221-22.

The Kanovitz article sets forth some arguments in support of the view that hypnosis may be better able to retrieve memories "kept out of conscious awareness by ego-defenses that protect the psyche from trauma," *id.* at 1194, than hypnosis used for normal memory recall. In the clinical setting, hypnosis may overcome the psychological barriers to remembering past traumas because it induces profound relaxation and calmness, intensifies concentration, and focuses the subject's attention inward. *Id.* at 1213. In addition, the clinical literature "abounds with case histories of spectacular memory successes." *Id.* at 1225. Finally, repressed memories of events that have a traumatic impact upon the witness may, even if unconscious, tend to remain fixed and survive longer than memories of events witnessed quickly, in the context of a great deal of other sensory information. *Id.* at 1231-32.

Based on those reasons, the article concludes that courts should be more willing to accept testimony based on retrieval of repressed memories than when hypnosis is used to enhance eyewitness accounts, particularly since failure to admit post-hypnotic testimony in cases like this one might discourage the use of hypnosis in therapy. Therapists might fear that patients who discover they were victimized as children could lose the opportunity for legal redress if their testimony was based on post-hypnotic recall. *See id.* at 1255-56. Noting, however, that clinical hypnosis is not without some risk of memory distortion—for example, clinicians may "overstep[ ] the boundaries of interviewing neutrality" and may be especially interested in their patients' "subjective impressions" of their pasts, rather than accurate recollections, *id.* at 1218—the Kanovitz article suggests that courts should ask "whether hypnosis can create sex-

ual abuse memories in subjects who have never experienced abuse." *Id.* at 1220. Because the "only evidence that hypnosis can implant false autobiographical memories comes from experiments with subjects who are hand-picked for their high hypnotizability," *id.* at 1235, a characteristic that can be measured, *id.* at 1238, the article suggests that "high hypnotizability [may be] a factor bearing on admissibility." *Id.* at 1239.

While we appreciate the force of many of these arguments, the fact remains that the literature has not yet conclusively demonstrated that hypnosis is a consistently effective means to retrieve repressed memories of traumatic, past experiences accurately. For example, the Council on Scientific Affairs has pointed out that the case histories of "spectacular memory successes" are anecdotal and difficult to verify independently and there are no controlled studies confirming these reports. Scientific Affairs, *supra*, at 1919. In addition, some in the clinical community express reservations concerning the theory of memory repression, or at least the phenomenon's prevalence. *See* Julie M. Murray, "Repression, Memory, and Suggestibility," 66 U. Colo. L. Rev. 477, 505-08 (1995). Furthermore, we are highly skeptical of the belief in the clinician's ability to "weed out most patently groundless claims" because childhood sexual abuse often "fits like a tailor-made glove" to certain psychiatric disorders. Kanovitz, *supra*, at 1242. Some therapists may be too eager to find patterns of behavior demonstrative of childhood sexual abuse. *See* Murray, 66 U. Colo. L. Rev. at 507-08. *But cf.* Colette M. Smith, "Recovered Memories of Alleged Sexual Abuse," 18 Seattle Univ. L. Rev. 51, 61 (1994) (noting that Harvard Medical School psychiatrist Judith Herman "believes that therapists rarely wield enough power over patients

to impose false memories on them"). Therefore, even though there may be important distinctions between the use of hypnosis to enhance memories of witnessed events and the use of hypnosis to retrieve repressed memories, given the lack of empirical studies as to the latter and the complicated nature of hypnotically-induced recall, we are not willing to assume that the risks of suggestibility, confabulation, and memory hardening are significantly reduced when the hypnosis that triggers the testimony is used for therapeutic purposes.

G. *Totality-of-the-Circumstances Approach*

Based on our review of the literature and the caselaw, we conclude that the district court was correct to reject a per se rule of admissibility or inadmissibility. A per se rule of exclusion or inclusion is too blunt a tool with which to address the concerns regarding the reliability of post-hypnotic testimony or the concerns that people who have been sexually abused may lose an opportunity to bring suit against their abusers.

To be sure, the exclusion of such testimony in every case avoids the problems of unreliability, but it ignores Federal Rule of Evidence 601, which "abolished almost all grounds for witness disqualification based on new assumptions that took a more optimistic view of witness reliability and jury perceptiveness." Federal Practice, *supra*, § 6011, at 124, 129. In addition, we believe that it risks the elimination of reliable testimony. *See State v. Iwakiri*, 682 P.2d 571, 577 (Idaho 1984).

On the other hand, to admit all such testimony without pause, even if the jury is informed of the risks of the potential problems of hypnotically-enhanced testimony, creates the danger of having a lay jury speculate as to

the effects of the hypnosis in the case before it. As a result, such an approach seems to us inadequate to protect defendants from unfounded charges in either criminal or civil suits. *See* Federal Practice, *supra*, § 6011, at 127-28. While we appreciate the care and sensitivity with which the district court chose its methodology, we nevertheless find its approach too rigid and restrictive and prefer a "totality-of-the-circumstances" approach. First, we believe that to treat the presence or absence of safeguards as the sole criteria of admissibility may not always mitigate the problems associated with hypnotically-refreshed memory, and it may "give hypnosis an aura of reliability which misleads the jury into disregarding the remaining dangers." Federal Practice, *supra*, § 6011, at 169-70.

Second, like the Fourth Circuit, we are reluctant to treat the presence of safeguards as a litmus test for determining the reliability of pre-trial hypnosis, since even though the safeguards are relevant to the inquiry, "a court cannot necessarily rest solely on the reliability *vel non* of the hypnosis procedures in ruling on the admissibility of the proffered testimony." *McQueen*, 814 F.2d at 958. Conversely, the absence of safeguards does not compel the conclusion in every case that post-hypnotic testimony is unreliable: "[E]ven if the hypnosis procedures are flawed, a trial or appellate court might discern that a witness' testimony was nonetheless independent of the dangers associated with hypnosis." *Id.*; *see also Iwakiri*, 682 P.2d at 578 ("[M]erely because one of the safeguards was not followed should not result in the automatic exclusion of the entire testimony.").

Thus, we believe that the rule of admissibility should be more flexible than the one suggested by the district court and we therefore find preferable the approaches

taken by the Eighth Circuit in *Sprynczynatyk*, 771 F.2d at 1112, and the Fourth Circuit in *McQueen*, 814 F.2d at 951. In *Sprynczynatyk*, the Eighth Circuit required pretrial hearings to assess the procedures used in hypnosis to determine "in view of all the circumstances," whether the testimony was sufficiently reliable and whether its probative value outweighed any prejudicial effect. 771 F.2d at 1122.

In *McQueen*, the Fourth Circuit required the trial court to

> conduct a balanced inquiry to determine if the testimony had a basis that was independent of the dangers associated with hypnosis—in other words, a balanced inquiry to determine whether a witness' memory and ability to testify from it was distorted by the earlier hypnosis. The balanced inquiry . . . cannot be circumscribed by narrow considerations, and . . . must be determined by a detailed factual analysis on a case-by-case basis.

814 F.2d at 958. Despite flawed hypnosis procedures, the Fourth Circuit concluded that the hypnotically-enhanced testimony of a witness to a murder was admissible because "considerable circumstantial evidence corroborated [the] testimony," *id.* at 959, her testimony "exhibited the characteristics normally expected from a witness recalling details of facts five years after their occurrence," and there was "no indication of a memory unshakably frozen by hypnosis," *id.* at 961.

In conducting a case-by-case analysis, the district court should consider the following non-exclusive list of factors. First, it should evaluate the purpose of the hypnosis: whether it was to refresh a witness's memory of an accident or crime or whether it was conducted as part

of therapy. In the former instance, the subject may feel pressured to remember details, to aid the criminal investigation, whereas when the subject has undergone therapy to explore the sources of her psychological ailments, she may be less inclined to confabulate or describe a complete coherent story. In the latter case, however, the court should be mindful of the possibility that the subject may have received subtle suggestions from her therapist that abuse or other traumas could be at the root of her problems. Thus, a second important consideration is whether the witness received any suggestions from the hypnotist or others prior to or during hypnosis such as a theory of the cause of the subject's ailments or key information relevant to the investigation for which she underwent hypnosis. A third and related factor is the presence or absence of a permanent record, which can help the court ascertain whether suggestive procedures were used. Ideally, the session should be videotaped or audiotaped. Fourth, a court should consider whether the hypnotist was appropriately qualified by training in psychology or psychiatry. A fifth factor is whether corroborating evidence exists to support the reliability of the hypnotically-refreshed memories. Sixth, evidence of the subject's hypnotizability may also be relevant. A highly hypnotizable subject may be more prone to confabulate and more susceptible to suggestion. Seventh, the court should consider any expert evidence offered by the parties as to the reliability of the procedures used in the case. Finally, a pretrial evidentiary hearing is highly desirable to enable the parties to present expert evidence and to test credibility through cross-examination.

After consideration of all of the relevant circumstances, the trial court should weigh the factors in favor and against the reliability of the hypnosis procedure in

the exercise of its discretion whether to admit the post-hypnotic testimony. Finally, we add that the party attempting to admit the hypnotically-enhanced testimony bears the burden of persuading the district court that the balance tips in favor of admissibility. *Hurd*, 432 A.2d at 97.

H. *Application of Admissibility Approach to this Case*

While we conclude that the test for admissibility adopted by the district court in this case was insufficiently flexible, and while we believe that it would have been more appropriate for the district judge to have conducted an evidentiary hearing prior to issuing his ruling, we nonetheless affirm the district court's in limine ruling and subsequent summary judgment. Since in our view the factors before the district court weighed decisively against the admissibility of Borawick's testimony, we are convinced that if the district court had followed our test, it would have necessarily reached the same conclusion. We see no point in remanding the case so that the district court can reach the same finding.

First, Borawick's assertions notwithstanding, it is beyond question that St. Regis lacked adequate professional qualifications as a hypnotist. While a panoply of academic qualifications is not necessary in all circumstances for one to qualify as an expert, there should be a general presumption in favor of appropriate academic credentials. The district court's finding that St. Regis was not properly qualified finds ample support in the record: his formal education ended with a high school diploma; he had no formal training in psychiatry or psychotherapy; his hypnotic technique used an experimental cranial electronic stimulator; he did not read the

professional literature; and his work experience prior to being a hypnotist at Pacific Medical Center was intermittent. The fact that Dr. Peters, a medical doctor, self-servingly stated that he considered St. Regis to be qualified is not enough to disturb the district court's determination.

There was also no permanent record of the procedures that St. Regis used; no videotapes, audiotapes, or even contemporaneously-drafted medical reports existed. 842 F. Supp. at 1507. As a result, the district court was not provided with any means, independent of St. Regis's testimony, to determine whether or not he was inadvertently suggestive in his approach or otherwise used suspect techniques in conducting the hypnosis. Without such a record, expert testimony would have been of little value, since experts similarly would have had no basis on which to evaluate the actual procedures St. Regis used.

Finally, we receive no comfort from the fact that St. Regis read excerpts from Borawick's deposition transcript prior to testifying himself. Given that he is not qualified and that the record lacks any basis on which to assess the reliability of the procedures he used, this circumstance further undermines the value, if any, of his testimony.

Our conclusion is reinforced by the inherent incredibility of Borawick's allegations. In this case, Borawick has levelled fanciful accusations of sexual abuse against numerous persons other than the defendants in this matter that include persons both familiar and unfamiliar to her. For example, Borawick allegedly recalls being raped and sexually abused at the age of three during rituals by men whom she believed to be members of the Masons. She also purports to recollect several incidents in which

she was drugged by injection as well as an incident in which she was forced to drink blood at a ritual involving a dead pig, incense, chanting, and people dressed in black gowns. Several additional incidents of a similarly unlikely nature involving sexual abuse by others are included in the sealed record. That Borawick has made these far-fetched, uncorroborated accusations against others, in addition to the defendants, erodes our confidence in the allegations against Morrie and Christine Shay and properly weighs against the admissibility of her hypnotically-induced memories.

We note that the district court failed to consider the evidence that Borawick offered as corroboration in her motion for reconsideration, including letters from her sister alleging abuse. In the face of the record before the district court, we find that Borawick's corroborating evidence was simply too weak to overcome the very strong evidence against admissibility. Consequently, we affirm the district court's ruling as to the in limine motion.

II. The Application of *Daubert*

Borawick also contends that the district court's in limine ruling was not consistent with *Daubert v. Merrell Dow Pharmaceuticals*, 113 S. Ct. 2786 (1993), in which the Supreme Court held that the test set forth in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), was superseded by the adoption of the Federal Rules of Evidence. *Id.* at 2793. In determining "the proper standard for the admission of expert testimony," *id.* at 2792, the Court noted that several of the Federal Rules of Evidence applied. Rather than impose a rigid framework of criteria that must be met in order for the testimony to be admissible, the Court ruled that judges must determine whether an expert's testimony "is scientifically valid" by

examining 1) whether the theory had been tested, 2) whether it had been subjected to peer review, 3) what the potential or known rate of error is, 4) what sort of standards control the technique's operation, and 5) whether the theory or technique has generally been accepted. *Id.* at 2796-97. This inquiry, the Court emphasized, should be flexible. *Id.* at 2797. In giving trial judges "the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand," *id.* at 2799, the Court assigned trial judges "a gatekeeping role" for the admissibility of scientific evidence. *Id.* at 2798.

We do not believe that *Daubert* is directly applicable to the issue here since *Daubert* concerns the admissibility of data derived from scientific techniques or expert opinions. The issue before us is whether Borawick is a competent witness, *see* Federal Practice, *supra*, § 6011, at 125-26, or whether her lay testimony is admissible, *Valdez*, 722 F.2d at 1200-01. Under either characterization, the question does not concern the admissibility of experimental data or expert opinions. *See id. But see Tuttle*, 780 P.2d at 1211 (rejecting the State's position that the issue only concerns the admissibility of testimony from a lay eyewitness as opposed to an expert on the basis that "the hypnotically enhanced testimony given by the witness is the product of scientific intervention").

Even though *Daubert* does not provide direct guidance, our decision today is informed by the principles underlying the Supreme Court's holding. First, by loosening the strictures on scientific evidence set by *Frye*, *Daubert* reinforces the idea that there should be a presumption of admissibility of evidence. Second, it emphasizes the need for flexibility in assessing whether

evidence is admissible. Rather than using rigid "safeguards" for determining whether testimony should be admitted, the Court's approach is to permit the trial judge to weigh the various considerations pertinent to the issue in question. Third, *Daubert* allows for the admissibility of scientific evidence, even if not generally accepted in the relevant scientific community, provided its reliability has independent support. Finally, the Court expressed its faith in the power of the adversary system to test "shaky but admissible" evidence, *Daubert*, 113 S. Ct. at 2798, and advanced a bias in favor of admitting evidence short of that solidly and indisputably proven to be reliable. Finally, we note that, even if *Daubert* were of direct application, nothing in *Daubert* is inconsistent with our outlined approach.

CONCLUSION

We have considered the Due Process and Seventh Amendment claims raised by Borawick and conclude that they are meritless. Consequently, for the foregoing reasons we affirm the district court's summary judgment in favor of defendants dismissing the complaint.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Seated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 17th day of October, one thousand nine hundred and ninety-five.

PRESENT: HON. ELLSWORTH A. VAN GRAAFEILAND
HON. JOHN M. WALKER, JR.
HON. JOSE A. CABRANES,
Circuit Judges.

Docket no.(s): 94-7584

JOAN S. BORAWICK,

Plaintiff-Appellant,

v.

MORRIE SHAY and CHRISTINE SHAY,

Defendants-Appellees

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED and DECREED that the judgment of said district court be and it hereby is affirmed in accordance with the opinion of this Court, with costs to be taxed against the appellant.

For the Court
GEORGE LANGE III, Clerk

By: /s/

Beth J. Meador
Administrative Attorney

A TRUE COPY
GEORGE LANGE III CLERK
/s/

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 29th day of December one thousand nine hundred and ninety-five.

Joan S. Borawick
Plaintiff-Appellant
v
Dkt no. 95-7584
Morrie Shay and Christine Shay,
Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellant Joan S. Borawick.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
GEORGE LANGE III, Clerk
By: s/s
Beth J. Meador,
Administrative Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

JOAN S. BORAWICK	:	5:92 CV00033 (TFGD)
v.	:	
MORRIE SHAY AND CHRISTINE SHAY	:	DATE: NOVEMBER 17, 1992

RECOMMENDED RULING ON DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

On January 24, 1992, plaintiff Joan S. Borawick commenced this diversity action against defendants Morrie Shay and Christine Shay; in her two-count complaint, plaintiff seeks compensatory and punitive damages for defendants' alleged willful, wanton, and malicious sexual assault, sexual molestation, and sexual exploitation of plaintiff. Defendants deny plaintiff's allegations and allege as affirmative defenses two Connecticut statutes of limitation.

On March 31, 1992, defendants filed a motion for judgment on the pleadings and brief in support (Dkt. ##17-18).[1] Plaintiff filed her brief in opposition on April 20, 1992 (Dkt. #24.)[2] On June 10, 1992, plaintiff sent this Magistrate Judge a

[1] Attached to the brief were the six exhibits: copies of Public Act Nos. 86-401 & 86-403 (Exh. A); copy of Public Act No. 91-240 (Exh. B); defendants' Local Rule 9(c) Statement (Exh. C); copy of Bell v. Swiercz, Dkt. No. 239508, 7 CSCR 355 (Super. Ct. Mar. 5, 1992) Exh. D); copy of plaintiff's discovery responses, dated March 30, 1992 (Exh. E); affidavit of defendant Morrie Shay (Exh. F).

[2] Attached to plaintiff's brief were seven exhibits: copy of the 1986 version of Conn. Gen. Stat. §52-577d (App. A); copy of the 1991 version of § 52-577d (App. B); copy of the legislative history of 1986 passage of § 52-577d (App. C); copy of the legislative history of 1991 amendment of § 52-577d (App. D); copy of

letter, to which was attached a copy of Roberts v. Caton, Dkt. No. 307859, 6 Conn. L.Rptr. No. 14, at 398 (Super. Ct. May 143, 1992). Defendants filed a supplemental memorandum on June 22, 1992, responding to plaintiff's letter (Dkt. #56).

For the reasons stated below, defendants' motion is denied.

I. FACTUAL BACKGROUND

The factual allegations in plaintiff's complaint are as follows: plaintiff, a citizen of California, is the maternal niece of the defendants, who are citizens of Connecticut; she was born on February 5, 1957 (Complaint First Count ¶¶1-4).

During the summers of 1961 and 1964, when plaintiff was four and seven years old, she was the guest of defendants at their home in Westport, Connecticut (id. First Count ¶6). Plaintiff alleges that in the summer of 1961, both defendants sexually assaulted, sexually molested, and sexually exploited her (id. First Count ¶7, Second Count ¶2). Plaintiff further alleges that during the summer of 1964, defendant Christine Shay sexually assaulted, sexually molested, and sexually exploited her (id. First Count ¶7). Plaintiff alleges defendants acted willfully, wantonly, and maliciously (id. First Count ¶8, Second Count ¶3). Plaintiff alleges multiple injuries as a result of these alleged incidents (id. First Count ¶¶9-12, Second Count ¶¶4-7).

II DISCUSSION

The standards applicable to a motion for judgment on the pleadings under F.R. Civ. P. 12(c) are identical to those for a motion to dismiss under Rule 12(b) (6). Ad Hoc Comm. of the Baruch Black & Hispanic Alumni Association v. Bernard m. Baruch College, 835 F.2d 980, 982 (2d Cir. 1987); Losacco v. City of Middletown, 745 F. Supp. 812, 814 (D. Conn. 1990). A

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the slip opinion in Bell v. Swiercz (App. E); copy of M. v. F., Dkt. No. 287194, 12 Conn. L.T. No. 3, at 21 (Super Ct. June 25, 1985) (App. F); copy of Ill. Code Civ. Proc. § 13-202.2 (Exh. G).

motion to dismiss under Rule 12(b) (6) tests only the insufficiency of the complaint. See Scheuer v. Rhodes, 416 U.S. 232, 236-37 (1974). Dismissal is inappropriate "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The complaint's allegations are assumed to be true and all reasonable inferences are drawn in favor of the opposing party. Scheuer, supra, 416 U.S. at 236. "In determining the adequacy of a claim..., consideration is limited to facts stated on the face of the complaint, in documents appended to the complaint or incorporated in the complaint by reference, and to matters of which judicial notice may be taken." Allen v. WestPoint-Pepperell, Inc., 945 F.2d 40,44 (2d Cir. 1991) (citation omitted).

The parties agree that this court, sitting in diversity, must apply the statutes of limitations of the forum state, Connecticut. Walker v. Armco Steel Corp., 446 U.S. 740, 745 (1980). Defendants argue plaintiff's complaint is barred by two Connecticut statutes of limitations, namely Conn. Gen. Stat. §§ 52-577 and 52-584.

A. SECTIONS 52-577 & 52-577d

Section 52-577 always has provided for a three-year limitation period applicable to actions based on tort. The parties disagree as to whether § 52-577d, entitled "limitation of action for damages to minor caused by sexual abuse, exploitation, or assault," applies to this case. The statute, as it currently is written,[3] provides:

> Notwithstanding the provisions of section 52-577, no action to recover damages for personal injury to a minor, including emotional distress, caused by sexual abuse, sexual exploitation or sexual assault may be brought by

[3]Section 52-577d originally was enacted in 1986 and provided a two-year limitation period from the date of majority, except no action could be brought more than seven years from the date of the act. The act was amended in 1991 to provide the seventeen-year limitations period.

such person later than seventeen years from the date such person attains the age of majority.

Plaintiff argues that the current version of § 52-577d applies retroactively to her case.

Conn. Gen. Stat. § 55-3 explicitly provides: "No provision of the general statutes, not previously contained in the statutes of the state, which imposes any new obligation on any person..., shall be construed to have a retrospective effect." Section 52-577d contains no express language regarding its prospective or retrospective effect. Despite fairly extensive legislative discussion on this statute (see Apps. C-D), there is precious little in the legislative history regarding retroactivity. To a forty-seven-year-old incest victim testifying before the Judiciary Committee, Representative Wollenberg commented: "I think this bill is maybe too late for you..." (id. at 1135); the witness acknowledged that she was beyond the statute of limitations (id. at 1136). During the legislative debate on this bill, Representative Tulisano remarked that "the main focus" of the amendment is to "extend[]" the statute "to individuals potentially 35 years old...." (id. at 4706). Representative Tulisano made mention of women who had become "dysfunctional in the[ir] marriages because of prior incidents and the only way [their husbands] thought they might be able to help somebody become whole was to be able to bring a cause of action against the perpetrator." (id. at 4706-07). None of these statements, however, shed any light on the legislative intent with respect to retroactive application of § 52-577d.

The seminal Connecticut case on the retroactive application of a statute is Jones Destruction, Inc. v. Upjohn, 161 Conn. 191, 286 A.2d 308 (1971), which considered Conn. Gen. Stat. § 49-39, the statute of limitations for a mechanics lien. The court held as follows:

> The determination of whether a statute is retrospective presents a question of legislative intent, and where there is no specific provision to that effect, the question becomes one of presumed intent. In this instance, § 49-39

> is silent as to its retroactive applicability. Where that is the situation, the rule to be applied to determine whether it is prospective or retroactive, depends, in some measure, on whether it affects substantive or procedural matters.

Id. at 195 (citation omitted). the court continued: "Such a statute is generally considered to be procedural especially where, as here, the statute contains only a limitation as to time with respect to a right of action and does not itself create the right of action." Id. See also Bauer v. Johns-Manville Corp., 599 F. Supp. 33, 35 (D. Conn. 1984); Collucci v. Sears, Roebuck &Co., 585 F. Supp. 529, 531-32 (D. Conn. 1984); Gormley v. State Employees retirement Comm'n, 216 Conn. 523, 527-532, 582 A.2d 764 (1990); Mulrooney v. Wambolt, 215 Conn. 211, 216-17, 575 A.2d 996 (1990); Champagne v. Raybestos-Manhattan, inc., 212 Conn. 509, 525-26, 562 A.2d 1110 (1989).

Contrary to the defendants' position, § 52-577d is not substantive, for it does not create a right of action to recover damages for sexual misconduct, but merely creates the appropriate statute of limitations for such claim. Section 52-577d carves out an exception to the general statute of limitations for actions based on tort. Recognizing unique problems associated with the tort of sexual abuse, the legislature extended the three-year period under § 52-577 to seventeen years under § 52-577d (see Apps. C-D).

Based on the foregoing line of reasoning, two recent Connecticut Superior Court decisions have applied § 52-577d retroactively. In Bell v. Swiercz, Dkt. No. 239508, 7 CSCR 335 (Super. Ct. Mar. 5, 1992), the court applied § 52-577d retroactively in granting plaintiff's prejudgment attachment request. The court found that § 52-577d is procedural in nature and "there is nothing in the legislative history to defeat the presumption that this particular statute should be given retroactive application." Id. at 336. Two months later, in Roberts v. Caton, Dkt. No. 308859, 6 Conn. l. Rptr. No. 14, at 398 (Super. Ct. May 13, 1992), the court denied a motion to dismiss a sexual assault claim because it found that § 52-577d applied retroactively

to the plaintiff's claim. The court stated:

> While a seventeen (17) year statute of limitations is rather unique to say the least and may well generate vigorous argument as to perceived excess, the rules of construction and our decisions addressing those rules mandate that such retroactivity be accorded this statute. Id. at 399.

Section 52-577d begins with the phrase, "[n]otwithstanding the provisions of section 52-577...." (emphasis added). Because §52-577d may be applied retroactively, plaintiff's claims are not barred by § 52-577.

Defendants argue that even should this court interpret § 52-577d as procedural, the statute should still not be applied retroactively. As the Connecticut Supreme Court observed in Jones Destruction, supra: "even if the statute is procedural, it will not be applied retroactively if considerations of good sense and justice dictate that it not be so applied." 161 Conn. at 196. In Jones Destruction, the court found such considerations to be present, where the amendment placed additional hurdles before a plaintiff:

> Good sense and judgment can hardly be said to dictate penalizing a plaintiff for failure to obtain a final judgment within a certain time limit due to at least some factors beyond the plaintiff's control. Hence, the conclusion is inescapable that the statute should not be construed as retroactive to pending actions such as the one here in issue.

Id. at 197 (citations omitted).

Such is not the case here. As Apps. C-D indicate, during the public hearing and legislative debates, the legislators were made aware, and discussed amongst themselves, that memories of sexual misconduct often are repressed for years by the alleged victims.

The Court is sensitive to defendants' legitimate concerns that they will be unable to remember, or substantiate, events which transpired perhaps decades earlier. The substantial passage of time works to the detriment of the plaintiff as well, upon whom the burden of proof lies. "Good sense and judgment" thus dictate that § 52-577d be applied retroactively, in keeping with the legislature's motivations behind the initial passage and amendment of § 52-577d.

Defendants' due process arguments fail as well. Defendants are not being denied notice, an opportunity to be heard, and a right to cross-examine adverse witnesses. See Boddie v. Connecticut, 401 U.S. 371, 378 (1970).

An underlying principle behind statutes of limitations "is to prevent the unexpected enforcement of stale claims, concerning which persons interested have been thrown off their guard by want of prosecution." Lametta v. Connecticut Light & Power Co., 139 Conn. 218, 221, 92 A.2d 731 (1952). Nevertheless, the law regarding due process and retroactive statutes of limitation is clear:

> "The Fourteenth Amendment does not make an act of state legislation void merely because it has some retrospective operation. What it does forbid is taking of life, liberty or property without due process of law.... Assuming that statutes of limitation like other types of legislation, could be so manipulated that their retroactive effects would offend the Constitution, certainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is per se an offense against the Fourteenth Amendment."

Electrical Workers v. Robbins & Myers, Inc., 429 U.S. 229, 243-44 (1976) (citation and emphasis omitted). Therefore, retroactive application of § 52-577d does not violate defendants' rights to procedural due process.

B. SECTION 52-584

In 1961 and 1964, when the incidents giving rise to this lawsuit allegedly occurred, § 52-584 provided a one-year limitations period for negligence actions:

> No action to recover damages for injury to the person, or to real or personal property, caused by negligence, or by reckless or wanton misconduct, ...shall be brought but within one year from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered.

(emphasis added).[4] Defendants similarly argue that plaintiff's lawsuit is barred by this statute, in light of plaintiff's description of defendants' alleged actions as "wanton" (Complaint First Count ¶8, Second count ¶3). During the legislative debates, Representative Woodcock described sexual abuse as "willful, wonton [sic] and reckless acts." (App. C., at 6339). It is well established that "[w]hen there are two conflicting sections of a general compilation or code of statute laws, that section should prevail which is derived from a source that can be considered as the last expression of the lawmaking power in enacting separate statutes upon the same subject." Tuohey v. Martinjak, 119 Conn. 500, 507-08, 177 A.2d 721 (1935) (citation omitted). Section 52-577d, which was enacted in 1986 and amended as recently as October 1991, is clearly the more recent expression of legislative intent regarding sexual abuse, sexual assault, or sexual exploitation.

Therefore, § 52-584 does not apply to this cause of action, despite plaintiff's use of the word "wanton" in her complaint.

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[4]The current version of § 52-584 provides for a two-year statute of limitations for negligence actions and applies only to injuries sustained on or after October 1, 1969.

III. CONCLUSION

Accordingly, for the reasons stated above, defendants' motion for judgment on the pleadings (Dkt. #17) is denied.

See 28 U.S.C. §636(b) **(written objections to ruling must be filed within ten days after service of same)**; F.R. Civ. P. 6(a), 6(e) & 72; Rule 2 of the Local Rules for United States Magistrates, United States District Court for the District of Connecticut; Small v. Secretary, H& HS, 892 F.2d 15, 16 (2d Cir. 1989) **(failure to file timely objection to Magistrate Judge's recommended ruling may preclude further appeal to Second Circuit).**

Dated at Bridgeport, Connecticut, this 17th day of November, 1992.

/s/_____
Joan Glazer Margolis
U.S. Magistrate Judge

JANUARY 27, 1993. Civ. No. 5:92CV00033 (TFGD).
After careful review and over objection, Magistrate Judge Margolis' well-reasoned Recommended Ruling is hereby AFFIRMED, APPROVED and ADOPTED.

SO ORDERED.

/s/_____
T.F. Gilroy Daly, U.S.D.J.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

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JOAN S. BORAWICK 5:92CV00033(TFGD)

v.

MORRIE SHAY, ET AL. DATE: MARCH 8, 1994

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RECOMMENDED RULING ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Familiarity is presumed with this Magistrate Judge's Ruling on Defendants' Motion in Limine, filed March 24, 1993 (Dkt. #95), Supplemental Ruling on Defendants' Motion In Limine, filed May 26, 1993 (Dkt. #112), and Ruling on Plaintiff's Motion for Reconsideration, filed August 18, 1993 (Dkt. #120), all of which were approved by U.S. District Judge T.F. Gilroy Daly on January 10, 1994, over plaintiff's objection.

Currently pending before the Court is defendants' motion for summary judgment (see Dkt. ##131, 135-141). On February 22, 1994, plaintiff filed her response (Dkt. #133), in which she indicated that she is unable to oppose defendants' motion, in light of the three previous rulings. This result is an unfortunate one, in that plaintiff apparently has be unable to develop any independent evidence (such as the testimony of her sister) to corroborate her claims.

Accordingly, defendants' motion for summary judgment (Dkt. #135) is granted.

See 28 U.S.C. §636(b) (written objectoins to ruling must be filed within ten days after service of same); F.R. Civ.P. 6(a), 6(e) & 72; Rule 2 of the Local Rules for United States Magistrate

Judges, United States District Court for the District of Connecticut; Small v. Secretary, H&HS, 892 F.2d 15, 16 (2d Cir. 1989) (failure to file timely objection to Magistrate Judge's recommended ruling may preclude further appeal to Second Circuit).

Dated at New Haven, Connecticut, this 8th day of March, 1994.

Joan Glazer Margolis
U.S. Magistrate Judge

May 6, 1994. Civ. No. 5:92CV00033 (TGFD).
After careful review, and over objection, Magistrate Judge Margolis' recommended Ruling is hereby AFFIRMED, APPROVED and ADOPTED. The Clerk of Court is directed to close the file on this matter.

So Ordered.

/s/
T.F. Gilroy Daly, U.S.D.S.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

JOAN S. BORAWICK

v. 5:92CV00033 TFGD

MORRIE SHAY, et al

JUDGMENT

This cause came on for consideration of Defendants' motion for summary judgment by the Honorable Joan G. Margolis, U.S. Magistrate Judge and the Honorable T.F. Gilroy Daly, U. S. District Judge, and

The Court having filed its recommended ruling granting the defendants' motion and said ruling having been affirmed, approved and adopted over objection,

It is therefore ORDERED and ADJUDGED that judgment enter in favor of the defendants Morrie and Christine Shay.

Dated at Waterbury, Connecticut, this 10th day of May, 1994.

KEVIN F. ROWE, Clerk

By /s/_____
Deputy Clerk

Federal Rules Evidence, Rule 412, 28 U.S.C.

Sex Offense cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition

(a) **Evidence generally inadmissible.**

The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.

(2) Evidence offered to prove any alleged victim's sexual predisposition.

(b) Exceptions

(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

(c) Procedure to determine admissibility.

(1) A party intending to offer evidence under subdivision (b) must:

(A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and

(B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule this court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

42 U.S.C.§ 13981. Civil rights

(a) **Purpose.** Pursuant to the affirmative power of Congress to enact this subtitle under section 5 of the Fourteenth Amendment to the Constitution, as well as under section 8 of Article I of the Constitution, it is the purpose of this subtitle to protect the civil rights of victims of gender motivated violence and to promote public safety, health, and activities affecting interstate commerce by establishing a Federal civil rights cause of action of victims of crimes of violence motivated by gender.

(b) **Right to be free from crimes of violence.** All persons within the United States shall have the right to be free from crimes of violence motivated by gender (as defined in subsection (d)).

(c) **Cause of action.** A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.

(d) **Definitions.** For purposes of this section--

(1) the term "crime of violence motivated by gender" means a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender; and

(2) the term "crime of violence" means--

(A) an act or series of acts that would constitute a felony against the person or that would constitute a felony against property if

the conduct presents a serious risk of physical injury to another, and that would come within the meaning of State or Federal offenses described in section 16 of title 18, United States Code, whether or not those acts have actually resulted in criminal charges, prosecution, or conviction and whether or not those acts were committed in the special maritime, territorial, or prison jurisdiction of the United States; and

(B) includes an act or series of acts that would constitute a felony described in subparagraph (A) but for the relationship between the person who takes such action and the individual against whom such action is taken.

CALIFORNIA PENAL CODE § 667.83. Ritual abuse; Sentence enhancement

(a) When a person is convicted of a felony violation of Section 207, 261, 264.1, 273a, 273d, 286, 288a, or 289 committed against a child under the age of 18 years or a violation of Section 288 committed against a child of the age designated in that statute, where the offense was committed as part of a ceremony, rite, or any similar observance, the person shall be punished by an additional term of three years in addition and consecutive to that violation.

(b) For purposes of this section, a "ceremony, rite, or any similar observance" shall mean nay of the following:

(1) Actual or simulated torture, mutilation, or sacrifice of any mammal.

(2) Forced ingestion, or external application of human or animal urine, feces, flesh, blood, or bones.

(3) Placement of a living child into a coffin, open grave, or other confined area containing animal remains or a human corpse or remains.

(c) This section shall not apply to:

(1) Lawful agriculture, animal husbandry, food preparation, or wild game hunting and fishing practices and specifically the branding or identification of livestock.

(2) The lawful medical practice of circumcision or any ceremony related thereto.

(3) Any state or federally approved, licensed, or funded research project.

(d) The enhancement charged in violation of subdivision (a) shall be proven by the testimony of two witnesses, or of one witness

and corroborating circumstances.

(e) The following provisions govern the imposition of this enhancement:

(1) Only one enhancement shall be imposed per victim per incident.

(2) If there are two or more victims, one enhancement may be imposed per victim per incident.

(f) the Department of Justice shall submit to the Legislature on or before January 1, 1998, a report compiling data from the Department of Justice form 8715 containing information relating to this section that has been reported into the Department of Justice automated criminal history system and is available on the longitudinal file.

(g) Persons responsible for the completion of the Department of Justice form 8715 shall submit the form to the Attorney General in a timely manner. In addition, those persons shall record all cases in which enhancements are charged under this section and the disposition of those cases.

(h) This section shall not be construed to infringe in any way upon the rights and practices of legitimate religions.

(i) This section shall remain in effect only until January 1, 1999, and as of that date is repealed unless a later enacted statute, that is enacted before January 1, 1999, deletes or extends that date.

(4) For the purpose of this section, "child" means any person under eighteen (18) years of age.

PENAL CODE
TITLE 18. CRIMES AND PUNISHMENTS
TITLE 15. CHILDREN AND VULNERABLE ADULTS

IDAHO CODE § 18-1506A (1994)

§18-1506A. Ritualized abuse of a child - Exclusions - Penalties - Definition

(1) A person is guilty of a felony when he commits any of the following acts with, upon, or in the presence of a child as part of a ceremony, rite or any similar observance:

(a) Actually or in simulation, tortures, mutilates or sacrifices any warm-blooded animal or human being;

(b) Forces ingestion, injection or other application of any narcotic, drug, hallucinogen or anaesthetic for the purpose of dulling sensitivity, cognition, recollection of, or resistance to any criminal activity;

(c) Forces ingestion, or external application of human or animal urine, feces, flesh, blood, bones, body secretions, nonprescribed drugs or chemical compounds;

(d) Involves the child in a mock, unauthorized or unlawful marriage ceremony with another person or representation of any force or deity [deity], followed by sexual contact with the child;

(e) Places a living child into a coffin or open grave containing a human corpse or remains;

(f) Threatens death or serious harm to a child, his parents, family, pets or friends which instills a well-founded fear in the child that the threat will be carried out; or

(g) Unlawfully dissects, mutilates, or incinerates a human corpse.

(2) The provisions of this section shall not be construed to apply to:

(a) Lawful agricultural, animal husbandry, food preparation or wild game hunting and fishing practices and specifically the branding or identification of livestock;

(b) The lawful medical practice of circumcision or any ceremony related thereto; or

(c) Any state or federally approved, licensed or funded research project.

(3) The penalty upon conviction of a first offense shall be imprisonment in the state prison for a term of not to exceed fifteen (15) years. Upon conviction of a second or subsequent offense, the penalty shall be for a term not more than life imprisonment.

(4) For the purposes of this section, "child" means any person under eighteen (18) years of age.

ILLINOIS REVISED STATUTES, Chapter 720, Section 5/12-33

Sec. 5/12-33. Ritualized abuse of a child. (a) A person is guilty of ritualized abuse of a child when he or she commits any of the following acts with, upon, or in the presence of a child as part of a ceremony, rite or any similar observance:

(1) actually or in simulating, tortures, mutilates, or sacrifices any warm-blooded animal or human being;

(2) forces ingestion, injection or other application of any narcotic, drug, hallucinogen or anaesthetic for the purpose of dulling sensitivity, cognition, recollection of, or resistance to any criminal activity;

(3) forces ingestion, or external application, of human or animal urine, feces, flesh, blood, bones, body secretions, nonprescribed drugs or chemical compounds;

(4) involves the child in a mock, unauthorized or unlawful marriage ceremony with another person or representation of any force or deity, followed by sexual contact with the child;

(5) places a living child into a coffin or open grave containing a human corpse or remains;

(6) threatens death or serious harm to a child, his or her parents, family, pets, or friends that instills a well-founded fear in the child that the threat will be carried out; or

(7) unlawfully dissects, mutilates, or incinerates a human corpse.

(b) The provisions of this Section shall not be construed to apply to:

(1) lawful agricultural, animal husbandry, food

preparation, or wild game hunting and fishing practices and specifically the branding or identification of livestock;

(2) the lawful medical practice of circumcision or any ceremony related to circumcision;

(3) any state or federally approved, licensed, or funded research project; or

(4) the ingestion of animal flesh or blood in the performance of a religious service or ceremony.

(c) Ritualized abuse of a child is a Class 1 felony for a first offense. A second or subsequent conviction for ritualized abuse of a child is a Class X felony for which the offender may be sentenced to a term of natural life imprisonment.

(d) For the purposes of this Section, "child" means any person under 18 years of age.

LOUISIANA REVISED STATUTES
La. R.S. 14:107.1 (1995)

107.1. Ritualistic acts

A. (1) The legislature hereby finds that this enactment is necessary for the immediate preservation of the public peace, health, morals, safety, and welfare and for the support of state government and its existing public institutions.

(2) The legislature further recognizes that:

(a) The preamble to the Constitution of Louisiana affirmatively states "We, the people of Louisiana, grateful to Almighty God for the civil, political, economic, and religious liberties we enjoy, and desiring to protect individual rights to life, liberty, and property; afford opportunity for the fullest development of the individual; assure equality of rights; promote the health, safety, education, and welfare of the people; maintain a representative and orderly government; ensure domestic tranquility; provide for the common defense; and secure the blessings of freedom and justice to ourselves an our posterity, do ordain and establish this constitution."

(b) The state, under its police power, may enact laws in order to promote public peace, health, morals, and safety.

B. (1) For purposes of this Subsection, "ritualistic acts" means those acts undertaken as part of a ceremony, rite, initiation, observance, performance, or practice that result in or are intended to result in:

(a) The mutilation, dismemberment, torture, abuse, or sacrifice of animals.

(b) The ingestion of human or animal blood or human or animal waste.

(2) The acts defined in this Subsection are hereby determined to

be destructive of the peace, health, morals, and safety of the citizens of this state and are hereby prohibited.

(3) Any person committing, attempting to commit, or conspiring with another to commit a ritualistic act may be sentenced to imprisonment for not more than five years or fined not more than five thousand dollars, or both.

C. (1) No person shall commit ritualistic mutilation, dismemberment, or torture of a human as part of a ceremony, rite, initiation, observance, performance, or practice.

(2) No person shall commit ritualistic sexual abuse of children or of physically or mentally disabled adults as part of a ceremony, rite, initiation, observance, performance, or practice.

(3) No person shall commit ritualistic psychological abuse of children or of physically or mentally disabled adults as part of a ceremony, rite, initiation, observance, performance, or practice.

(4) Any person who commits, attempts to commit, or conspires with another to commit a violation of this Subsection shall be sentenced to imprisonment for not less than five nor more than twenty-five years and may be fined not more than twenty-five thousand dollars.

D. Each violation that occurs under the provisions of this Section shall be considered a separate violation.

E. The provisions of this Section shall not be construed to apply to generally accepted agricultural or horticultural practices and specifically the branding or identification of livestock.

F. The provisions of this Section shall not be construed to apply to any state or federally approved, licensed, or funded research project.

MONTANA CODE Ann., §27-2-217 (1994)

27-2-217. Tort actions - ritual abuse of minor.

(1) An action based on intentional conduct brought by a person for recovery of damages for injury suffered as a result of ritual abuse of a minor must be commenced not later than:

(a) 3 years after the act of ritual abuse of a minor that is alleged to have caused the injury; or

(b) 3 years after the plaintiff discovers or reasonably should have discovered that the injury was caused by the act of ritual abuse of a minor.

(2) It is not necessary for a plaintiff to establish which act, in a series of acts of ritual abuse of a minor, caused the injury that is the subject of the suit. The plaintiff may compute the period referred to in subsection (1) (a) from the date of the last act by the same perpetrator.

(3) As used in this section, "ritual abuse of a minor" means any act committed against a plaintiff who was less than 18 years of age at the time the act occurred and that would have been a violation of 45-5-627.

(4) The provisions of 27-2-401 apply to this section.

TITLE 45 CRIMES
CHAPTER 5 OFFENSES AGAINST THE PERSON
Part 6 Offenses Against the Family
Mont. Code Anno., §45-5-627 (1994)

45-5-627. Ritual abuse of minor -- exceptions -- penalty

(1) A person commits the offense of ritual abuse of a minor if the person purposely or knowingly and as part of any ceremony, rite, or ritual or of any training or practice for any ceremony, rite, or ritual:

(a) has sexual intercourse without consent with a person less than 16 years of age; commits assault, aggravated assault, or felony assault against a victim less than 16 years of age; or kills a person less than 16 years of age;

(b) actually or by simulation tortures, mutilates, or sacrifices an animal or person in the presence of the minor;

(c) dissects, mutilates, or incinerates a human corpse or remains in the presence of the minor;

(d) forces upon the minor or upon another person in the presence of a minor the ingestion or the external bodily application of human or animal urine, feces, flesh, blood, bone, or bodily secretions or drugs or chemical compounds;

(e) places a living minor or another living person in the presence of a minor in a coffin or open grave that is empty or that contains a human corpse or remains; or

(f) threatens the minor or, in the presence of the minor, threatens any person or animal with death or serious bodily harm and the minor reasonably believes that the threat will or may be carried out.

(2) This section does not apply to activities, practices, and procedures otherwise allowed by law.

(3) A person convicted of ritual abuse of a minor shall:

(a) for the first offense, be imprisoned in the state prison for a term of not less than 2 years or more than 20 years and may be fined not more than $50,000, or both; and

(b) for a second or subsequent offense, be imprisoned in the state prison for a term of not less than 2 years or more than 40 years and may be fined not more than $50,000, or both.

(4) In addition to any sentence imposed under subsection (3), after determining pursuant to 46-18-242 the financial resources and future ability of the offender to pay restitution, the court shall require the offender, if able, to pay the victim's reasonable costs of counseling that result from the offense. The amount, method, and time of payment must be determined in the same manner as provided for in 46-18-244.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

JOAN S. BORAWICK, PLAINTIFF	*	
	*	592CV00033 (TFGD)
	*	
VS.	*	
	*	SEPTEMBER 6, 1994
MORRIE SHAY AND CHRISTINE SHAY, DEFENDANTS	*	

AFFIDAVIT OF [REDACTED]*

I, [REDACTED] being duly sworn, depose and say the following:

1. I am over the age of eighteen years and understand and believe in the obligations of an oath. My date of birth is [REDACTED], 1975.

2. I have personal knowledge of the facts contained in this affidavit.

3. I currently reside in the State of [REDACTED] and I am presently enlisted in the armed services. There is a possibility that I may be sent overseas during the upcoming months.

4. I am the [REDACTED] of Joan Borawick and the [REDACTED] of Morrie Shay.

5. [REDACTED]

*The name and other identification information of the affiant has been redacted to protect the victim per C.G.S. §54-86(e).

6. In 1984 or 1985, at approximately the age of 9, I visited my [REDACTED] Morrie Shay and Christine Shay at their home in Westport, Connecticut. I made this visit with [REDACTED] and we stayed at the Shay's home for about two weeks.

7. I have memories of having been sexually abused by Morrie Shay in one of the bedrooms of the Shay home during the visit to Connecticut. I remember Morrie Shay in the bedroom with his pants down and him making sexual contact with me.

8. I also remember playing the game "dress up" with Christine Shay during this visit. The game involved dressing up, putting on make up, and putting on jewelry.

9. I have written many poems concerning my feelings regarding sexual abuse. In 1989 I sent the attached typed version of the lyrics from the song "Live To Tell" to [REDACTED] Joan Borawick.

10. I have also attended therapy and meetings of Incest Survivors Anonymous to get help in coping with my feelings concerning having been sexually abused.

THE AFFIANT

[REDACTED]

State of [REDACTED]

ss.

County of [REDACTED]

Sworn and subscribed to before me the undersigned notary public on this 6th day of September, 1994.

/s/
Notary Public
My Commission Expires:
9 Apr. 1995
VIRGINIA M. CLAUSEN

I have a tale to tell sometimes it gets so hard to hide it well,
I was not ready for the fall...to blind to see the writing on the wall.

CHORUS

A man can tell a thousand lies I've learned my lesson well, hope I live to tell the secret I have learned, till then it will burn inside of me.

I know where beauty lives I've seen the it once I know the warmth she gives,
The light that you could never see, it shines inside you can't take that from me.

CHORUS

The truth is never far behind, you kept it hidden well...if I live to tell the secret I knew then it will burn inside of me.

If I ran away I'd never have the strength to go very far, how would they hear the beating of my heart, will it grow cold? When will they learn? How will they hear? How will they know the secret I have learned to hide so well.

CHORUS

(MADONNA - LIVE TO TELL)

"Goodwill, good tidings," angels say,
for Love was born on Christmas Day.
[printed matter]

Dec 25th 94
[handwritten]

JOYOUS CHRISTMAS WISHES
[printed matter]

[handwritten] Love,
/s/

P.S. [handwritten]

Uncle Morrie and Aunt Chris did rape me when I was little also Joan, and I do not care if they disown me or hate me,

your sister, /s/

ENUMCLAW COURIER-HERALD

August 9, 1973

LAWYER CHARGED WITH NEGLIGENT HOMICIDE IN SUMNER GIRL'S DEATH

The death of a 17-year-old Sumner girl in a traffic accident in Enumclaw in the early morning hours of Saturday, July 28, has resulted in the filing of negligent homicide charges against a Midway lawyer who has also served as a Des Moines Municipal Court judge and acting Superior Court judge.

The charges were filed in Superior Court last Friday against Myron L. Borawick, 49, of Midway, Deputy Prosecutor James J. Lamont accused Borawick of driving recklessly and being under the influence of alcohol when his station wagon struck a motorcycle carrying Nora Wray Lamport, 17, on West Griffin Avenue in Enumclaw.

Miss Lamport who was employed at an Auburn restaurant was a passenger on a motorcycle driven by Robin Owen, 22, Auburn. Owen suffered cuts and possible head and body injuries in the accident.

According to Lamont, the accident took place about 2 a.m. on Saturday, July 28, when the motorcycle upon which Owen and Miss Lamport was westbound on Griffin Avenue near the site of the new Catholic church. The charges allege that Borawick's station wagon struck the motorcycle from the rear. Enumclaw police report that the victim was dragged more than 700 feet after the collision. Miss Lamport's body was found under the station wagon after it came to a halt.

An hour and ten minutes prior to the fatal accident, Sgt. D.E. Robinson of the Enumclaw Police Department, had issued Borawick a citation for negligent driving. Robinson said that the Borawick vehicle was traveling east on Griffin toward its intersection with Highway 410 and that Borawick failed to stop at the "Stop" sign and hit a traffic island.

Robinson said he did not arrest Borawick then, but after issuing the citation, escorted him to a restaurant adjacent to King County Park where the attorney said he was to meet a client.

During the next hour, Robinson resumed his patrol and about 2 a.m. while parked in the Stop 'n' Go parking lot, he observed the Owen motorcycle proceeding westbound on Griffin Avenue, with lights on the front and rear of the motorcycle in operation.

Only moments later, Sgt. Robinson observed the station wagon he had stopped and cited earlier traveling at an estimated 50 miles an hour in a 30-mile-an-hour zone. He wheeled the city patrol car in a U-turn in pursuit and arrived at the scene of the accident only seconds after it had occurred.

Borawick was taken to the Enumclaw city jail where he was charged with driving while intoxicated. He was released on his personal recognizance later Saturday morning to Robert Kuvara, his personal attorney.

The defendant told investigators he had been attending a golf tournament and meeting in Enumclaw of the South King County Bar Association prior to the fatal accident.

The negligent homicide charges were filed in Superior Court Friday morning and Superior Court Judge David Soukoup allowed Borawick to be released on his personal recognizance.

The day prior to the accident Borawick had been serving as an acting King County Superior Court judge.

Borawick has maintained a private practice with offices in the Puget Sound National Bank building at Midway. He has served on the bench for some ten years.

(2)

No. 95-1576

Supreme Court, U.S.
FILED
APR 25 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

JOAN S. BORAWICK,

Petitioner,

vs.

MORRIE SHAY AND CHRISTINE SHAY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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28pp

QUESTION PRESENTED

1. Whether petitioner's failure to file the petition for rehearing within 14 days of the entry of judgment in the United States Court of Appeals results in a lack of jurisdiction to consider the petition for a writ of certiorari?

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APPENDIX

Appendix A — Order 1a

Appendix B — General Docket in the Second Circuit Court of Appeals 2a

Respondents request that the Court dismiss or deny the petition for writ of certiorari seeking review of an opinion of the United States Court of Appeals for the Second Circuit. The court of appeals decision is reported at 68 F.3d 597 (2d Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3669 (U.S. April 9, 1995) (No. 95-1576). (For the convenience of the Court, all citations to the opinion will include citation to the opinion attached as Appendix 1A-32A to the petition).

STATEMENT OF JURISDICTION

Judgment entered in the United States Court of Appeals for the Second Circuit on October 17, 1995. The petition for rehearing was not timely filed within fourteen days.

The instant petition was filed on March 28, 1996, more than ninety days since the entry of judgment by the court of appeals, and the period for applying for a writ of certiorari has not been extended by a justice of this Court (28 U.S.C. § 2101(c) and Rule 13 of this Court).

STATUTES INVOLVED

28 U.S.C. § 2101(c) provides:

> **§ 2101. Supreme Court; time for appeal or certiorari; docketing; stay**
>
> (c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of

certiorari for a period not exceeding sixty days.

STATEMENT OF THE CASE

Petitioner's lengthy statement of the case contains misstatements of fact, inclusion of irrelevant matter, omissions of procedural matters and plain argument. Respondents believe the case is concisely stated in the decision of the court below. (App. to Pet. for Cert. 2A-7A; 28A-30A). In addition certain specific matters set forth in petitioner's statement should be corrected.

Respondents do not concede that petitioner has ever suffered from "traumatic psychogenic amnesia." (Pet. at 5).

Petitioner's July 1992 motion to enlarge the time to take depositions was denied without prejudice (App. 1a); it sought leave to await a ruling on a pending motion for judgment and thereafter "the parties may wish to take the depositions of out of state witnesses located as far away as California and the State of Washington." (R.__). The equivocal motion was silent concerning who the witnesses might be, why depositions were necessary or any purpose to be served.

The next motion petitioner filed regarding depositions was dated February 10, 1993, seven months after the first such motion and nearly three months after the respondents' motion *in limine* was filed. Petitioner's subjective anticipation of an "evidentiary hearing" is belied by a record which is devoid of a request to submit any evidence at a "hearing" other than the voluminous documents, briefs and deposition transcripts which both parties did submit. The assertion that the February 10, 1993 motion was never acted upon is incorrect. First, petitioner sought leave *inter alia* to depose by telephone the hypnotist Valerian St. Regis. She obtained an order granting her that specific relief and

referring expressly to the motion. *Borawick v. Shay*, 842 F. Supp. 1501, 1505, n. 7 (D. Conn. 1994). On June 7, 1993 her February 10, 1993 motion was withdrawn without prejudice to renewal. It was not "renewed" until after a recommended ruling to grant summary judgment; it was objected to, and denied.

Irrelevant matters include the reference on the first page of petitioner's statement of the case to the chronological circumstances surrounding her late father's death and inclusion of a newspaper article respecting an accident in 1973 (App. to Pet. for Cert. 67A-68A), and, with the exception of the lyrics from a song by Madonna (App. to Pet. for Cert. 65A), none of the material set forth in petitioner's appendices at pp. 49A-68A was before the court of appeals prior to the panel opinion and entry of judgment.

Petitioner's statement of the case points to no denial of any attempt or opportunity to place before the courts below any additional information regarding the qualification of petitioner's hypnotist, Valerian St. Regis.

REASONS FOR DENYING THE WRIT

I.

SINCE THE PETITION FOR REHEARING WAS NOT TIMELY FILED IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, THERE IS NO JURISDICTION TO CONSIDER THE PETITION FOR A WRIT OF CERTIORARI SINCE IT WAS FILED AFTER JANUARY 15, 1996.

There is a lack of jurisdiction in this Court to entertain the petition for writ of certiorari since petitioner's petition for rehearing was not timely filed in the court of appeals.

Judgment entered in the court of appeals on October 17, 1995 (App. 8a). Fed. R. App. P. 36 states that "notation of a judgment in the docket constitutes entry of the judgment." Thereafter petitioner had 14 days to file a petition for rehearing since Fed. R. App. P. 40(a) states that a "petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule." Since petitioner was then filing papers other than a brief and appendices, the petition for rehearing was required to be received by the clerk of the court of appeals within the fourteen day period. Fed. R. App. P. 25(a).[1] The fourteen day period expired on October 31, 1995 and the petition for rehearing was not "received" by the clerk until November 1, 1995, and not filed until November 13, 1995 (App. 8a).

"A petition for certiorari must be filed within 90 days of the entry of the judgment below. 28 U.S.C. § 2101(c). This '90-day limit is mandatory and jurisdictional.' *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990)." *Federal Election Commission v. NRA Political Victory Fund*, __ U.S. __, 115 S. Ct. 537, 539 (1994).

Supreme Court Rule 13.3 states:

> 3. The time to file a petition for a writ of

---

1. Fed. R. App. P. 25(a) states:

> **(a) Filing.** A paper required or permitted to be filed in a court of appeals must be filed with the clerk. Filing may be accomplished by mail addressed to the clerk, but filing is not timely unless the clerk receives the papers within the time fixed for filing, except that briefs and appendices are treated as filed on the day of mailing if the most expeditious form of delivery by mail, except special delivery, is used.

> certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice). But if a petition for rehearing is timely filed in the lower court by any party, the time to file the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment. A suggestion made to a United States court of appeals for a rehearing en banc is not a petition for rehearing within the meaning of this Rule unless so treated by the United States court of appeals.

The fact that briefs and appendices may be filed by mail is of no consequence since the only similarity between an appellate "brief" and a petition for rehearing is that by rule the latter must be produced in the same manner as the former. Fed. R. App. P. 32(b) (Form of other Papers).

Since 1942 "it has been the consistent practice of the Court to treat petitions for rehearing timely presented to the courts of appeal as tolling the start of the period in which a petition for certiorari must be sought until rehearing is denied or a new judgment is entered on the rehearing." *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990). The Court's precedent and current rule both provide that such petition must be "timely" filed. The petition for rehearing was not timely filed and neither any local rule nor any order of the court of appeals extended the time for filing; petitioner's 90-day time within which to file the instant petition expired on January 15, 1996. This petition was filed well beyond

the untimeliness discussed in the dissenting opinions in *Deal v. Board of Education*, 402 U.S. 962 (1971) and *Teague v. Commissioner of Customs*, 394 U.S. 977 (1969).

The Court should dismiss the petition for writ of certiorari for want of jurisdiction.

II.

PETITIONER'S FAILURE TO SEEK REVIEW OF THE CONCLUSION OF THE DISTRICT COURT AND THE COURT OF APPEALS THAT HER HYPNOTIST WAS NOT QUALIFIED COMPLETELY UNDERMINES THE QUESTIONS PRESENTED.

As the court of appeals noted, "[t]he linchpin of the district court's ultimate decision to exclude Borawick's testimony was its finding as to the first safeguard: that St. Regis [the hypnotist] was not qualified." *Borawick v. Shay*, 68 F.3d 597, 601 (2d Cir. 1995), (App. to Pet. for Cert. 8A-9A) *citing, Borawick v. Shay*, 842 F. Supp. 1501, 1508-1509, n. 5 (D. Conn. 1994). In fact, in the court of appeals petitioner expressly asserted that "the rule of admissibility advocated by the plaintiff for anyone who has undergone therapeutic hypnosis would assume that the hypnotist was appropriately qualified. . . ." (R.__, Appellant's reply brief, No. 94-7584, August 31, 1994 at 9).

The court of appeals held, *inter alia*, that "Borawick's assertions notwithstanding, it is beyond question that St. Regis lacked adequate professional qualifications as a hypnotist." *Borawick v. Shay*, 68 F.3d at 609 (App. to Pet. for Cert. 28A). The summary of hypnosis set forth in *Rock v. Arkansas*, 483 U.S. 44 (1987) observed that "[h]ypnosis by trained physicians or psychologists has been recognized as a valid therapeutic technique since 1958. . . ." *Id.* at 60. The conclusion of the

magistrate judge, district court and court of appeals that petitioner's hypnotist was not appropriately qualified is sufficient reason to deny the petition. Petitioner's claim that this conclusion was erroneous, made in passing, is not sufficiently set forth as a precise question presented to warrant review.

The petition is replete with unsupported assertions that hypnosis does not affect memory, and multiple alleged accounts of satanic religious events, other rituals and cults. It includes irrelevant and unsupported assertions such as "[p]sychological manipulation, the misuse of hypnotic drugs and hypnosis are all conduct characteristic of ritual child abuse." (Pet. at 25).

Should this Court ever undertake to review the admissibility of hypnotically induced testimony under the Federal Rules of Evidence in a civil case, the record should, at least, include a qualified hypnotist.

III.

IF THE PETITIONER SEEKS REVIEW OF WHAT SHE AND THE COURT OF APPEALS CHARACTERIZED AS A QUESTION OF FIRST IMPRESSION, THEN NO CONFLICT PRESENTLY EXISTS AMONG THE CIRCUITS REQUIRING RESOLUTION BY THE COURT.

Petitioner argued to the court of appeals that "admissibility of testimony in a civil case by a plaintiff who previously resorted to therapeutic hypnosis was an issue of first impression for the district court and is one of first impression for this Court as well." (R.__ Appellant's appellate brief, No. 94-7584, July 22, 1994 at 24). The court of appeals stated that "[t]his case presents an issue of first impression: the circumstances under which an alleged victim of sexual abuse may testify as to memories of abuse following therapeutic hypnosis." *Borawick v. Shay*, 68 F.3d at 598. (App. to Pet. for Cert. 2A).

If petitioner and the court of appeals are correct, then no conflict among the circuits exists to warrant discretionary review by the Court.

Rock, supra, noted that hypnosis for therapeutic purposes has been recognized "since 1958," *id.* at 60, yet the court of appeals found "[t]he parties have not cited, nor are we aware of any case concerning the specific issue before us: the admissibility of testimony about memories of childhood sexual abuse that are recalled for the first time in adulthood following the use of hypnosis as part of psychotherapy." *Borawick v. Shay*, 68 F.3d at 600 (App. to Pet. for Cert. 7A-8A). If this issue has only arisen once since 1958 (and before), then it would seem to be so fact specific and rare as to justify denying the petition.

IV.

NO CONFLICT AMONG THE CIRCUITS EXISTS IN THE CASES SUBMITTED BY PETITIONER JUSTIFYING REVIEW BY THE COURT.

There is no actual conflict between the courts of appeals requiring resolution by the court. The federal cases petitioner has cited consist of thirteen from the courts of appeals and two district court decisions regarding hypnosis. Seven of the appellate decisions are habeas corpus proceedings reviewing state court criminal convictions obtained under state rules of evidence. One of two district court decisions is a habeas proceeding.

Of the remaining cases, *Wyller v. Fairchild Hill Corp*, 503 F.2d 506 (9th Cir. 1974) was decided before enactment of the Federal Rules of Evidence. *Kline v. Ford Motor Co.*, 523 F.2d 1067 (9th Cir. 1975) was docketed in 1974, *ibid.*, and the panel decision in September, 1975 refers not to the Federal Rules of

Evidence but to only the California Evidence Code. The Federal Rules of Evidence became effective on July 1, 1975. Pub. L. 93-595, §1, January 2, 1975, 88 Stat. 1926. *See, e.g., United States v. Mackey*, 405 F. Supp. 854, 856 (E.D.N.Y. 1975) (Weinstein, J.). *United States v. Miller*, 411 F.2d 825 (2d Cir. 1969) was also decided before enactment of the Federal Rules of Evidence.

The 1979 Ninth Circuit opinion in *United States v. Awkard*, 597 F.2d 667 (9th Cir. 1979) *cert. denied*, 444 U.S. 885 (1979), published some eight years before the Court's opinion in *Rock v. Arkansas*, 483 U.S. 44 (1987), acknowledged the necessity of some "procedures to be followed during hypnosis" *id.* at 669, n. 2, which if not followed could result in a pre-trial admissibility hearing before the district judge. *Ibid.*; *United States v. Adams*, 581 F.2d 193, 198-99 (9th Cir. 1978), *cert. denied*, 439 U.S. 1006 (1978).

United States v. Valdez, 722 F.2d 1196 (5th Cir. 1984), decided under the Federal Rules of Evidence, reversed the district court admission of posthypnotic identification testimony.

Petitioner's remaining circuit court decision is *Sprynczynatyk v. General Motors Corp.*, 771 F.2d 1112 (8th Cir. 1985), *cert. denied*, 475 U.S. 1046 (1986) placing the "hypnosis evidentiary problem directly within the control of the district court." *Id.* at 1123. This is the approach adopted by the district court, *Borawick v. Shay*, 842 F. Supp. at 1504, and although modified in scope, an approach consistent with the Second Circuit opinion in this case.

What has emerged over time in the cases regarding hypnotically induced testimony is, in part, exemplified by *Biskup v. McCaughtry*, 20 F.3d 245 (7th Cir. 1994), *cert. denied*, __ U.S. __ (March 18, 1996), 64 U.S.L.W. 3623 (U.S. March 19,

1996) (No. 95-975). That court acknowledged the independent authority of the State of Wisconsin to establish its own rules, subject to review for constitutional error, regarding the admissibility of post-hypnotic testimony, *id.* at 255, while suggesting that, "if one were to write on a totally clean slate with reference to this subject, there would be great appeal of the kind of *per se* rule enunciated by the Supreme Court of Arkansas in *Rock v. State*, 288 Ark. 566, 708 S.W. 2d 78 (1986) paralleling concerns as to suggestiveness in Chief Justice Rehnquist's dissent in *Rock* [483 U.S. at 62-65]." *Id.* at 254. In any event, no discernable conflict or sharp division exists among the courts of appeals on this question of federal evidence.

V.

PETITIONER'S FIFTH AND SEVENTH AMENDMENT CLAIMS ARE MERITLESS.

Petitioner presents two questions of whether "the Court of Appeals for the Second Circuit violated" her rights under the Fifth Amendment and Seventh Amendment by its "methodology." The same claims then directed at the district court, were made in the court of appeals which considered them and found "that they are meritless." (App. to Pet. for Cert. 32A). The claims now directed at the panel of the United States Court of Appeals for the Second Circuit remain meritless; notably, the petition is barren of any acknowledgement of the responsibility of the district court to resolve preliminary questions of admissibility. Fed. R. Evid. 104(a). "Judge Daly and Magistrate Judge Margolis were highly sensitive to the various concerns surrounding post-hypnotic testimony." *Borawick v. Shay*, 68 F.3d at 600. (App. to Pet. for Cert. at 8A).

Mills v. Rogers, 457 U.S. 291 (1982), instead of supporting petitioner, reflects "this Court's settled policy to avoid

unnecessary decisions of constitutional issues." Since both courts below found petitioner's hypnotist clearly unqualified, no constitutional questions need even be considered. The issue presented in *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261 (1990) was "whether the United States Constitution grants what is in common parlance referred to as a 'right to die' " *id.* at 277 and whether Missouri could choose "the rule of decision which it did." *Ibid.* That issue is not presented here.

Petitioner's Seventh Amendment cases are not on point; for example, *Woodell v. International Brotherhood of Electrical Workers*, 502 U.S. 93 (1991) ("petitioner was entitled to a jury trial on the LMRDA cause of action. . . ." *Id.* at 98); *Edmondson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) "whether a private litigant in a civil case may use peremptory challenges to exclude jurors on account of their race." *Id.* at 616.

Petitioner's complaint that the district court failed to provide "the rape shield protection afforded by Fed. R. Evid. 412" (Pet. at 28) is meritless. Petitioner never argued in the district court that the rule might apply because it was not effective in its present form until December 1, 1994. Fed. R. Evid. 412, P.L. 103-322, § 40141, 108 Stat. 1918-1919.

None of the cases cited by petitioner lead to the conclusion that the United States Court of Appeals for the Second Circuit acted in a manner inconsistent with this Court's Fifth or Seventh Amendment jurisprudence.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A — ORDER

JULY 23, 1992. Civ. No. 5:92CV00033 (TFGD). DENIED without prejudice for lack of good cause shown. Counsel are reminded that pending motions do not typically justify an extension of the discovery period.

/s/ T. F. Gilroy Daly
T. F. Gilroy Daly, U.S.D.J.

APPENDIX B — GENERAL DOCKET IN THE SECOND CIRCUIT COURT OF APPEALS

GENERAL DOCKET FOR
Second Circuit Court of Appeals

Filed: 6/13/94

Court of Appeals Docket #: 94-7584
Nsuit: 4320 TORTS INJURY-Assault Slander
Borawick v. Shay, et al
Appeal from: U.S. District Court CTDC

Case type information:
1) Civil
2) Private
3) none

Lower court information:
District: 0205-05: 92-cv-33
Trial Judge: T.F. Gilroy Daly
Date Filed: 1/24/92
Date order/judgment: 5/10/94
Date NOA filed: 6/3/94

Fee status: paid

Prior cases:
None
Current cases:
None

Panel Assignment:
Panel: JMW EVG JAC Plz :Fed 12/19/94 am
Date of decision: 10/17/95

Appendix B

JOAN S. BORAWICK Plaintiff - Appellant	Helen L. McGonigle, Esq. 203-740-0074 [COR LD NTC ret] Law Office of Helen L. McGonigle, Esq. P.O. Box 326 Brookfield, CT 06804-0326
MORRIE SHAY Defendant - Appellee	Charles W. Fleischmann, Esq. 203-367-7440 [COR LD NTC ret] Gulash & Fleischmann P.O. Box 9118 350 Fairfield Ave. Bridgeport, CT 06601
CHRISTINE SHAY Defendant - Appellee	Charles W. Fleischmann, Esq. (See above) [COR LD NTC ret]

Appendix B

Official Caption 1/

Docket no.(s): 94-7584

JOAN S. BORAWICK,

Plaintiff-Appellant,

v.

MORRIE SHAY and CHRISTINE SHAY,

Defendants-Appellees.

Authorized Abbreviated Caption 2/

Docket no.(s): 94-7584

BORAWICK V. SHAY

1/ Fed. R. App. P. Rule 12(a) and 32(a).
2/ For use on correspondence and motions only.

Appendix B

6/13/94	Copy of district court docket entries and notice of appeal on behalf of Appellant Joan S. Borawick filed. [94-7584] Form C due on 6/13/94. Form D due on 6/13/94. (cot)
6/13/94	Appellant Joan S. Borawick Form C filed, with proof of service on 6/9/94. [94-7584] Form C deadline satisfied. (cot)
6/13/94	Appellant Joan S. Borawick Form D filed. [94-7584] Form D deadline satisfied. (cot)
6/23/94	Scheduling order #1 filed. Record on appeal due on 7/18/94. Appellant's brief and appendix due on 7/25/94. Appellee's brief due on 8/24/94. Argument as early as week of 9/12/94. (Pre-Argument Conference scheduled for 7/7/94 @ 12:15p[illegible]). (com)
7/11/94	Appellant Joan S. Borawick motion for leave to file oversized brief of 67 pages FILED (w/pfs). [538645-1] (rsk)
7/12/94	Order FILED GRANTING motion for leave to file oversized brief [538645-1] by Appellant Joan S. Borawick, endorsed on motion form dated 7/11/94. Order Signed by SAB. (onk)
7/22/94	Appellant Joan S. Borawick brief FILED with proof of service. (com)

Appendix B

7/22/94	Appellant Joan S. Borawick joint appendix filed w/pfs. Number of volumes: 5. NOTE- Vol 2 is sealed. (com)
7/22/94	Appellant Joan S. Borawick sealed appendix filed w/pfs. Number of volumes: 1. (com)
7/26/94	Notice of appearance form on behalf of Helen L. McGonigle, Esq., received. (Orig. to Calendar) (cma)
7/26/94	Notice of appearance form on behalf of Charles W. Fleischmann, Esq., received. (Orig. to Calendar) (cma)
8/1/94	Record on appeal index in lieu of record filed. (ono)
8/10/94	Letter dated August 10, 1994 submitted by Helen L. McGonigle received. Re: Missing Page #48 Within Appellant's Brief filed on July 22, 1994. (onk)
8/19/94	Appellees' Morrie Shay and Christine Shay brief filed with proof of service. SERVICE EFFECTED BY PERSONAL DELIVERY ON AUGUST 19, 1994. (onk)
9/1/94	Appellant Joan S. Borawick reply brief filed with proof of service. (onk)
11/4/94	Proposed for argument the week of 12/19/94. USCthse 2:00 P.M. (ca92)

Appendix B

11/4/94	Letter received from Charles W. Fleischmann notifying the Court that he is unavailable for oral argument 12/5 - 12/6. (cv71)
11/21/94	Set for argument on 12/19/94. [94-7584] AT 2:00PM in the USCthse. (ca92)
12/19/94	Case heard before VAN GRAAFEILAND, WALKER, CABRANES, C.JJ (TAPE: 100) (ca92)
8/24/95	Letter dated 8/22/95 submitted by Helen L. McGonigle received. Re: Supplemental Record. [Forwarded To Panel] (cv74)
8/25/95	Record on appeal after index filed. (4 vols) (cv70)
9/18/95	Letter sent to Appellant Joan S. Borawick's counsel stating: The panel that heard the above-captioned case wishes to inform you that your request to supplement the record is too informal to warrant action. (GLIII) (cv70)
9/22/95	Letter dated 9/21/95 submitted by Helen L. McGonigle received. Re: Response To Letter Dated 9/18/95 In Reference To Record On Appeal. [Forwarded To Panel] (cv74)
9/26/95	FIRST SUPPLEMENT to the Record on appeal after index filed. (cv74)

Appendix B

10/17/95	Judgment of the district court is AFFIRMED by published signed opinion filed. (JMW) (cv70)
10/17/95	Judgment filed. (cv70)
10/25/95	Note: The OPINION PRICE is $6.40 (rek)
10/27/95	Appellee's Christine Shay and Morrie Shay itemized and verified bill of costs received. [Forwarded To AA] (cv74)
10/30/95	Appellee's Christine Shay and Morrie Shay statement of costs taxed in the amount of $281.20 filed. (cv74)
11/1/95	Appellant Joan S. Borawick petition for rehearing received. Problem: Motion Required For Additional Papers Attached To Petition; Contacted Atty. (cv74)
11/8/95	Appellant Joan S. Borawick motion for permission to file addendum to petition for rehearing FILED (w/pfs). [721120-1] [Forwarded to AA] (cv74)
11/13/95	Order FILED GRANTING motion for permission to file addendum to petition for rehearing [721120-1] by Appellant Joan S. Borawick, endorsed on motion form dated 11/8/95. [Per JAC] (cv74)

Appendix B

11/13/95	Appellant Joan S. Borawick Petition for rehearing and with suggestion for rehearing in banc [722211-2] with proof of service filed. (cv74)
11/14/95	Response and Opposition from Appellees' Christine Shay and Morrie Shay received. (cv74)
11/14/95	Response and Opposition of the appellees returned to Appellee's Christine Shay and Morrie Shay. [Motion Previously Decided] (cv74)
12/29/95	Order FILED DENYING petition for REHEARING and with suggestion for rehearing in banc [722211-2] by Appellant Joan S. Borawick. [Per BJM] (cv74)
1/5/96	Judgment MANDATE ISSUED. (cv74)
2/2/96	Mandate receipt returned from the district court. (ren)

A TRUE COPY
GEORGE LANGE III, CLERK
BY /s/ Carolyn Clark Campbell
Chief Deputy Clerk

Docket as of April 4, 1996

MOTION FILED

APR 2 6 1996

(3)

No. 95-1576

In The

Supreme Court Of The United States

October Term, 1995

JOAN S. BORAWICK
Petitioner

v.

MORRIE SHAY AND CHRISTINE SHAY
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE AMICUS BRIEF AND BRIEF OF *AMICI CURIAE*, AMERICAN COALITION FOR ABUSE AWARENESS, B.E.A.M., BELIEVE THE CHILDREN, ECLIPSE, INTERNATIONAL SOCIETY FOR PROFESSIONAL HYPNOSIS, JUSTICE FOR CHILDREN, MARILYN VAN DERBUR INSTITUTE, INC., MOTHERS AGAINST SEXUAL ABUSE, NATIONAL GUILD OF HYPNOTISTS, INC., NATIONAL FEDERATION OF HYPNOTISTS 104-OPEIU-AFL/CIO, NATIONAL VICTIM CENTER,* (*IDENTITY OF AMICI CURIAE CONTINUED ON NEXT PAGE) IN SUPPORT OF THE PETITIONER

Counsel for Amici Curiae
Karen Davidson
321 South Main Street, Suite 101
Providence, R.I. 02903
(401) 453-6200

35pp

(IDENTITY OF *AMICI CURIAE*, CONTINUED)
ONE VOICE: THE NATIONAL ALLIANCE FOR ABUSE AWARENESS, SURVIVORS AND VICTIMS EMPOWERMENT (SAVE), SURVIVOR CONNECTIONS, INC., SURVIVORS' NETWORK OF THOSE ABUSED BY PRIESTS (SNAP), THE INTERNATIONAL COUNCIL ON CULTISM AND RITUAL TRAUMA, THE LINKUP-SURVIVORS OF CLERGY SEXUAL ABUSE, INC., TREATING ABUSE TODAY,
IN SUPPORT OF PETITIONER

MOTION FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The ruling of the court below profoundly effects the diverse interests of many citizens, including blameless victims of child sexual abuse, adult and child victims of trauma, victims of sexual assault and violent crimes, mental health and other professionals who use hypnosis, and virtually anyone who has previously undergone any of the many forms of therapeutic hypnosis. The impact of the court of appeals ruling is so vast, and the interests so varied, that the eighteen amici are in a position to present the issues from a broader and different perspective than the parties.

The Petitioner's letter consenting to the filing of the attached amicus brief is submitted herewith. The Respondents have withheld consent, necessitating this motion.

I. IDENTITY AND INTERESTS OF AMICI CURIAE

1) American Coalition For Abuse Awareness ("ACAA"), based in Washington, D.C., is a national legislative coalition of over thirty organizations and hundreds of individuals, including adult and child victims of sexual abuse, mental health and legal professionals, non-offending parents and other supporters. ACCA's goal is to promote legislative leadership and to afford access to the legal system for adult and child victims of sexual abuse. ACCA has an interest in more fully presenting the subject matter of childhood sexual abuse from a broader perspective than the parties. ACAA's president is Sherry A. Quirk, Esq.

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BTC has an interest in more fully presenting the subject matters of child sexual abuse and ritual abuse. Its executive director is Beth Vargo.

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II. ARGUMENT ON THE MOTION

The prevalence of child sexual abuse is alarming and the emotional scars it leaves enduring. It is estimated that between one fifth to one third of all women have experienced some form of sexual abuse in childhood. Williams, *Recall of Childhood Trauma: A Prospective Study of Women's Memories of Child Sexual Abuse*, 62 Journal of Consulting and Clinical Psychology 1167 (1994).

The issues raised by the petition effect the rights and interests of many, including numerous victims of incest, rape, violent crimes, ritual abuse, clergy abuse, cult ritual abuse, and trauma victims. These issues also extend to the many professionals who use hypnosis, and to anyone who has undergone hypnosis, whether for alleviation of stress, chronic illness, chronic pain, weight reduction, to enhance athletic performance, to improve self-confidence, to treat phobias, or for the multitude of other beneficial uses of hypnosis. The amici are in a better position and have a greater familiarity with the profound impact of the Court of Appeals ruling upon persons other than the parties. The issues raised by the petition are of consequence to a vast multitude of persons.

THE AMICI CURIAE

BY_____

Karen Davidson
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(401) 453-6200
Counsel for Amici Curiae

No. 95-1576

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QUESTIONS PRESENTED FOR REVIEW

I. Whether Individuals Previously Hypnotized For Therapeutic Purposes Are Competent To Testify In Civil Cases Under Federal Rule of Evidence 601, Being An Issue Of Compelling Public Importance Left Undecided By This Court In *Rock v. Arkansas*, 483 U.S. 44 (1987)?

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18) Treating Abuse Today ("TAT"), based in Seattle, Washington, is an entity which publishes a bimonthly publication for clinicians and other professionals who work with people who have suffered trauma, including survivors of physical, emotional, and sexual abuse. TAT has an interest in ensuring that the interests of survivors of trauma are more fully presented. The editor and publisher of *Treating Abuse Today* is David Calof.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Child sexual abuse and incest leaves enduring and devastating emotional and psychological scars upon its victims. Tragically, it is a social ill often perpetuated from one generation to the next. It is estimated that as many as one in five females and one in seven males are sexually assaulted by age eighteen. The perpetrator is usually someone familiar to the victim. While some victims may not survive the assault, many of the survivors develop dissociative disorders and post-traumatic stress disorder. Symptoms can include fear, helplessness, shock, disbelief, guilt, humiliation, embarrassment, anger, self-blame, flashbacks of the rape, avoidance of previously pleasurable activities, avoidance of the place and circumstance where the assault occurred, depression, sexual dysfunction, insomnia, impaired memory, anxiety, panic attacks, sleep disorders, somatization disorders, eating disorders, chronic pain, gastrointestinal distress, and other lingering medical problems. Reliable prospective and retrospective studies have demonstrated that victims of sexual

abuse can experience dissociative amnesia of the abuse for varying periods of time.

Hypnosis is a mental process and naturally occurring state of mind that all individuals experience. It has been practiced for over two hundred years and has been officially recognized by the American Medical Association and the American Psychological Association for decades. Recently, in 1995, an independent panel of the National Health Institute found hypnosis effective for treating cancer-related pain, irritable bowel syndrome and tension headaches. Undeniably, a large portion of our population has been hypnotized for approved therapeutic reasons. The legal rights of these and others previously hypnotized individuals to testify may be jeopardized if the Court of Appeal's nonexclusive multi-factor "totality of the circumstances" test remains law.

Borawick v Shay offers this Court the opportunity to rectify the decision of the court of appeals. Federal Rule of Evidence 601 mandates that every person is competent to be a witness unless otherwise noted in the succeeding sections of Article Six. Yet, there is nothing so noted or otherwise contained in the Federal Rules of Evidence which supports adoption of the "nonexclusive" multi-factor "totality of the circumstances test" as a precondition to testifying.

The methodology utilized by the court of appeals condones the practice of allowing appellate courts to evaluate credibility by reviewing the underlying claims on contested issues of fact (where there was no trial or evidentiary hearing and thus an inadequate record for any review, even an improper one). This overreaching exercise of judicial discretion encroaches upon the province of Congress, by disregarding Federal Rule of Evidence 601's mandate that every person is competent to be a witness, and also encroaches upon the province of the jury in evaluating credibility. If the court of appeals decision remains law it will condone the practice of barring testimony at the expense of all previously hypnotized civil litigants Fifth Amendment right to due process and Seventh Amendment right to a jury trial. When scientific studies demonstrate that contaminating effects on memory are no more likely to occur from the use of hypnosis

than from many nonhypnotic interviewing and interrogative procedures, the Respondents constitutional rights of due process are adequately protected through cross-examination and offering expert testimony.

The court of appeals decision impacts the right to testify for any civil litigant who has previously been hypnotized. Moreover, a "nonexclusive" factor test gives little future guidance to those professionals who use hypnosis, and will have a chilling effect on the use of a valuable therapeutic modality. The *amici* join in urging this Court to grant the petition for writ of certiorari.

THE ARGUMENT

I. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER INDIVIDUALS PREVIOUSLY HYPNOTIZED FOR THERAPEUTIC PURPOSES ARE COMPETENT TO TESTIFY IN CIVIL CASES UNDER FEDERAL RULE OF EVIDENCE 601, BEING AN ISSUE OF COMPELLING PUBLIC IMPORTANCE, IMPACTING THE INTERESTS OF MANY, AND LEFT UNDECIDED BY THIS COURT IN *ROCK V. ARKANSAS*

A. THE ISSUE IS OF COMPELLING PUBLIC IMPORTANCE

While the Petitioner consents to the filing of this amicus brief, the Respondents withheld consent necessitating the preceding motion. The amici are representative of the diverse interests effected by the decision of the court of appeals.

The Court of Appeal's decision jeopardizes the right to testify for all individuals who have previously been hypnotized for therapeutic purposes. The decision also impacts the interests of the many professionals who use hypnosis, who now may be inhibited from using this valuable therapeutic tool for fear that they may jeopardize the legal rights of their patients.

The test adopted by the court of appeals for the admissibility of testimony following the therapeutic use of

hypnosis required consideration of the following "nonexclusive" list of factors: 1) an evaluation of the purpose of the hypnosis, whether investigative or therapeutic; 2) whether the subject received any suggestions from the hypnotist or others prior to or during the hypnosis; 3) the presence or absence of a permanent record, which can help the court ascertain whether suggestive procedures were used, [with the court of appeals stating] that ideally the sessions should be videotaped or audiotaped; 4) whether the hypnotist was appropriately qualified by training in psychology or psychiatry; 5) whether corroborating evidence exists to support the reliability of the hypnotically-refreshed memories; 6) evidence of the subject's hypnotizability; 7) and consideration of expert evidence offered by the parties as to the reliability of the procedures used. *Borawick v Shay*, 68 F.3d 597, 607-608 (2nd Cir. 1995).

Hypnosis has been used as a therapeutic treatment modality for over a century, having even more widespread use in the past few decades. Beginning in 1955, the British Medical Association endorsed therapeutic hypnosis, followed by the Canadian Medical Association's and the Council of Mental Health of the American Medical Association's (AMA) endorsements in 1958. In 1960, two years after the AMA's approval, the American Psychological Association (APA) endorsed hypnosis as a branch of psychology. Scheflin & Shapiro, *Trance On Trial*, pp. 57-58 (Guilford Press 1989).

In addition to its use by some psychiatrists and psychologists, therapeutic hypnosis is used by a multitude of other professionals, including hypnotherapists, anesthesiologists, obstetricians, optometrists, podiatrists, chiropractors, osteopaths, dentists, marriage and family counselors, social workers, pediatricians, oncologists, nurses, rehabilitation specialists, pain control specialists, habit control specialists, educators, athletic trainers, the clergy and attorneys[1]. *Id.* p.6.

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[1] In his book entitled *The Legal Aspects of Hypnosis*, Dr. William J. Bryan, Jr. has a chapter titled "Winning Cases Through Hypnosis". Bryan, *Legal Aspects of Hypnosis*, Springfield, Il: Charles C. Thomas, 1962.

As recently as October of 1995, an independent panel of the National Institutes of Health (NIH) determined that meditation and hypnosis are among the alternative treatments recognized to help millions of Americans cope with insomnia, chronic pain, irritable bowel syndrome and tension headaches. For *Chronic Pain Try Hypnotism, Relaxation,* (Associated Press), The News-Times, October 19, 1995 at A-9, col. 1; *Mediation, Hypnosis Relieve Pain, Insomnia, Panel Says National Institutes of Health Urge Greater Acceptance of Therapies*,(Associated Press), Rocky Mountain News, October 19, 1995 at 41A. The panel recommended that treatments be administered by nurse practitioners and social workers to reduce costs. *Id.*

Having been endorsed by the AMA, the APA, and now, an independent panel of the NIH, the use of hypnosis has increased in popularity. Prestigious hospitals such as Mount Sinai Medical Center and Memorial Sloan-Kettering Cancer Center in New York have found hypnosis a valuable tool for treating pain. *Hypnosis Gains Credence As Influence on the Body; It Helps Control Pain, Fear and Habits*, The New York Times, February 24, 1996 at Section 1, page 23, col 2. Even paramedics are using hypnotic techniques to calm trauma victims. Several members of the North Tarrytown, New York Volunteer Fire Department Ambulance Corps studied hypnosis techniques during a workshop to improve their communication skills with accident victims. *Id.*

Although identical in effect, a definitional distinction should be drawn between hetero-hypnosis, self-hypnosis and spontaneous hypnosis. Hetero-hypnosis involves both a hypnotist and subject whereby the hypnotist facilitates the mental process of hypnosis using one of many methods of induction. While no data are available as to the number of individuals who have undergone therapeutic hetero-hypnosis, they are undoubtedly many in number. There are over 4,000 members of the National Guild of Hypnotists, Inc. alone, who have undoubtedly hypnotized tens of thousands of individuals over the course of the guild's existence since 1951.

Apart from the widespread use of hetero-hypnosis, self-hypnosis, otherwise known as auto-hypnosis, can occur through

the use of widely available aids such as hypnotic tapes, or spontaneously.

Self-hypnosis is a mental state virtually experienced by all individuals, whether absorbed by reading a good book, experiencing "highway hypnosis" while driving, during athletic exertion, or as part of a religious experience. When self-hypnosis is a mental state which can occur spontaneously in a broad segment of the population, with or without the aid of hypnotic tapes, it is difficult to fathom how many millions of Americans have been hypnotized. All hypnosis is really self-hypnosis and we all engage in self-hypnosis:

> There are many myths about hypnosis. One of the most common myths is that someone takes control of your mind and programs you like a computer. This is not true. No one can be hypnotized if they don't wish to be, and you cannot be made to do anything in hypnosis that would be contrary to your values. No one can violate your free agency. Similarly, no one can make you reveal anything in hypnosis that you don't wish to reveal... In actuality, hypnosis is not something someone does to you. All hypnosis is really self-hypnosis. You are the one who induces a hypnotic state, and the person working with you is simply a facilitator who guides you in what to do. There is nothing mystical or magical about hypnosis. Hypnosis is simply a state of concentration and focused attention. It is actually a state of consciousness that we enter naturally, but we usually don't call it hypnosis or trance. For example, how many times have you driven down the road, deep in thought, preoccupied in thinking about something? You suddenly snap out of it and realize that you haven't seen anything for several blocks. Almost everyone has had this experience. These focused, concentrated states of attention are naturally occurring hypnotic or trance-like states. *D. Corydon Hammond, Ph.D. in his Manual For Self-Hypnosis* (American Society of Clinical Hypnosis 1987), pp. 2-3.

Coinciding with the increasingly frequent use of therapeutic hetero-hypnosis and the common occurrence of self-hypnosis, is the astoundingly high incidence of child abuse in this country. The Department of Health and Human Services reports that 1,012,000 children in 48 states were victims of substantiated child abuse and neglect in 1994, an increase of 27 percent since 1990. *Child Maltreatment 1994: Reports from the States to the National Center on Child Abuse and Neglect* (March 1996). The HHS report found that 53 percent of maltreated children suffered neglect, 26 percent physical abuse, 14 percent sexual abuse, 5 percent emotional abuse and 22 percent other forms of maltreatment. *Id.* This study suggests that there were at least 141,680 cases of sexual abuse in 1994.

Data has also been collected on reports of child rape. In a study conducted by the U.S. Department of Justice analyzing reports of rape in 11 states and the District of Columbia, the Bureau of Justice Statistics determined that over half the victims were under 18, even though females under 18 comprise only one-fourth the female population, sixteen percent of the victims were under 12, and 35 percent were between ages 12 and 18. *Child Rape Victims*, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics (June 1994, NCJ-147001).

A recent survey of convicted offenders in state correctional facilities conducted by the U.S. Department of Justice also confirms that victims of rape and sexual assault are often children. This study determined that nearly two-thirds of rapists and sexual assaulters in state prison committed their crime against a child. *Child Victimizers: Violent Offenders and Their Victims*, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics (March 1996, NCJ-153258). Seventy-eight percent of those convicted of sexual assault had abused a child. The victims of violent crimes were typically children whom they had known, not randomly selected strangers. Nearly a third of those serving time in State prisons had victimized their own child or a stepchild. *Id.* at p. iv. About one-half had a relationship with the victim as a friend, acquaintance, or relative other than offspring. *Id.* Among inmates who committed their violent crime against a child, 3 in 10 reported having victimized more than one child. *Id.* at p.9. Offenders serving time for crimes against children were more likely to have grown up in

homes with both parents present, to have suffered sexual abuse as a child, and to have committed their offenses in their own home. *Id.* at p.6. Like other behavior, abuse is often perpetuated from one generation to another, with some abused later becoming abusers.

The American Medical Association reports that sexual assault is the most rapidly growing violent crime in America, claiming a victim every 45 seconds. News Release: AMA Reports *"Silent Violent Epidemic" of Sexual Assault Throughout The United States* (AMA, Nov. 6, 1995). The National Victim Center reports that over 700,000 women are raped or sexually assaulted annually. Crossing gender lines, the crime is often committed upon our nation's children; an estimated 61% of victims of sexual assault are under age 18. An astounding 29% of all forcible rapes are perpetrated upon victims less than 11 years old. As many as 80% of the assaults are perpetrated by assailants known to the victim, such as family members, intimates, friends, and acquaintances. *Sexual Assault in America Prepared by the American Medical Association* (AMA, November 6, 1995).

Many victims of sexual assault develop post-traumatic stress disorder and rape trauma syndrome. Symptoms include fear, helplessness, shock and disbelief, guilt, humiliation and embarrassment, anger, self-blame, flashbacks of the rape, avoidance of pleasurable activities, avoidance of the place or circumstance in which the rape occurred, depression, sexual dysfunction, insomnia, and impaired memory. *Facts About The Mental Health Effects of Violence,* American Medical Association Backgrounder (November 1995). It is estimated that as many as 3.8 million adult American women have had rape-related post-traumatic stress disorder. *Rape in America: A Report To The Nation* (prepared by the National Victim Center and Crime Victims Research and Treatment Center, April 23, 1992). Symptoms may also include depression, anxiety, panic attacks, sleep disorders, substance abuse, aggression, dissociative states, somatization disorders, eating disorders, chronic pain, suicidal tendencies, chronic head, face or pelvic pain, gastrointestinal distress, insomnia, pseudo-neurological symptoms and other medical complaints common to adult survivors of child physical and sexual abuse. *Id.*

Common diagnoses for victims of adult and child victims of rape are Posttraumatic Stress Disorder, Dissociative Disorders such as Dissociative Amnesia (formerly Psychogenic Amnesia), and Dissociative Identity Disorder (formerly Multiple Personality Disorder). Kanovitz, *Hypnotic Memories and Civil Sexual Abuse Trials*, 45 Vand. L. Rev. 1185 (1994); also see, the American Psychiatric Association's *Diagnostic And Statistical Manual of Mental Disorders*, DSM-IV (4th ed. 1994) diagnostic codes 309.81 for Posttraumatic Stress Disorder, 300.12 for Dissociative Amnesia, and 300.14 for Dissociative Identity Disorder. The Diagnostic And Statistical Manual is the source generally relied upon by psychiatrists, psychologists and other mental health professionals in making a diagnosis. *Beagel v State*, 813 P.2d 699, 708 (Alaska App. 1991).

Several types of memory disturbances have been described in Dissociative Amnesia: localized amnesia, the inability to recall events during a circumscribed period of time usually following a traumatic event; selective amnesia, the ability to recall some, but not all of the events during a circumscribed period of time; generalized amnesia, a failure to recall one's entire life; continuous amnesia, an inability to recall events subsequent to a specific time; and systematized, the loss of memory for certain categories of information. *Diagnostic And Statistical Manual of Mental Disorders*, DSM-IV, p. 478 (4th ed. 1994).

Hypnotic states overlap with dissociative disorders. Indeed, for this reason, some experts recommend hypnosis in the treatment of dissociative disorder therapies for victims of sexual abuse. Spiegel, *Hypnosis In The Treatment of Victims of Sexual Abuse*, 12 Psychiatric Clinics of North America, No. 2, p. 307 (1989). Many individuals who suffer from dissociative disorders also have a heightened capacity to lapse into spontaneous trance states. Kanovitz, *Hypnotic Memories and Civil Sexual Abuse Trials*, 45 Vand. L. Rev. 1185, 1208 n. 89 (1992). The American Psychiatric Association's DSM-IV also *recommends the use of hypnosis* to distinguish Dissociative Amnesia from Amnestic Disorder Due to a General Medical Condition. DSM-IV, p. 408. It would be ironic indeed if victims of child sexual abuse would be barred from testifying because of the very dissociative capacities brought about by the

abuse.

Legislative, judicial and societal developments in the past seven years will cause this evidentiary issue to arise repeatedly. Since 1989, nineteen states have enacted laws preserving the tort claims for adults who were sexually abused as children and who experienced dissociative amnesia for the abuse. Comment, *Recovered Memories of Childhood Sexual Abuse: The Admissibility Question*, 68 Temple L. Rev. 249, 257 (1995). By legislative enactment, twenty-three jurisdictions toll the statute of limitations for plaintiffs who have repressed memories of childhood sexual abuse. *Id.* at 257. Seven jurisdictions have judicially recognized the delayed discovery rule for purposes of tolling the statute of limitations in instances where plaintiffs completely repress their memories of abuse. *Id.* at 255. Opening the door for civil redress, it seems illogical that victims of sexual assault will now be disabled from testifying in their own civil cases if they were, at some point, hypnotized.

A number of empirical studies verify the existence of lost access to memory and the possibility of accurate memory recovery in sexual abuse cases. A prospective study of 129 women who had documented histories of child sexual abuse found a full 38% of the women did not report the abuse that was recorded in earlier hospital documents when they were asked about the experiences seventeen years later. An additional 16% who did recall the abuse, did not have continuous recall for the sexual abuse. Bowman & Mertz, *A Dangerous Direction: Legal Intervention In Sexual Abuse Survivor Therapy*, 109 Harvard Law Review 549, 604-608 (1996) citing Williams, *Recall of Childhood Trauma: A Prospective Study of Women's Memories of Child Sexual Abuse*, 62 Journal of Consulting and Clinical Psychology 1167 (1994). The phenomenon of dissociative amnesia for childhood sexual abuse has been documented in numerous prospective, retrospective and survey studies. Williams 1994, Herman & Schatzow, 1987, Briere and Conte, 1993, Elliot and Briere, 1995, and other studies.

The Briere and Conte study of 450 adults with reported histories of childhood sexual abuse found that 59.3% of the subjects reported a period of amnesia for the abuse. The variables most predictive of amnesia were "molestation at an early age, extended

abuse, and variables reflecting especially violent abuse". The last category included victimization by multiple perpetrators, physical injury accompanying the abuse, and belief that death would result if the abuse were disclosed. *Id.* at 606.

Proven cases also establish the existence of substantially accurate delayed recall for childhood sexual abuse. The cases of Frank Fitzpatrick and Ross Cheit are illustrations. 109 *Harv. L. Rev.* at 610, n. 335. In 1989 at the age of 41, Frank Fitzpatrick recovered his initial memories of sexual abuse by former priest James Porter who sexually abused over 100 children since the 1960s. The abuse was confirmed by Porter's admission in a recorded phone conversation and on video, and by numerous other individuals who came forward, some of whom had continuous memory of the abuse. *Id.* Ross Cheit, an ethics professor at Brown University, recovered fully blocked memories of sexual abuse that had occurred almost 25 years earlier at the San Francisco Boys Chorus summer camp. Cheit was able to obtain confirmation from other victims and individuals who witnessed incidents of molestation by the same perpetrator. *Id.*

Many victims of child sexual abuse, who have otherwise valid claims, may have been at some point in their lives hypnotized for approved medical reasons. The court of appeal's test will be an evidentiary barrier for many of these individuals.

This case presents itself as a timely opportunity to settle the law and prevent needless litigation concerning this evidentiary issue. The petitioner was hypnotized under the direction of her medical doctor for the supplemental treatment of chronic illness and stress, approved medical purposes. Those who have also been hypnotized for approved medical purposes, who engage in self-hypnosis, who have dissociative disorders and lapse into spontaneous trance, are all at risk of losing their right to testify in their own civil cases because of an inability to comply with the Court of Appeal's nonexclusive multi-factored test. A "nonexclusive" test also gives no definitive guidance to professionals who use hypnosis and hypnotic techniques.

It would be a perversion of justice if individuals raped by a

psychiatrist, psychologist or mental health care worker[2] were now disabled from testifying in their own cases because of an inability to meet the court of appeal's test. Psychotherapeutic sexual involvement with patients is a leading cause of all private psychotherapist malpractice claims, and is the most frequent source of litigation against psychologists insured through the American Psychological Association. *Therapist-Patient Sexual Exploitation And Insurance Liability*, 27 Tort & Ins. L.J. 596-597 (1992). In instances where the victim may have been hypnotized during or after the assault, adherence to a multi-factored evidentiary test as a precondition to testifying is tantamount to granting a license to rape. The perpetrator could easily sabotage compliance with the test as a means of barring the victim's testimony making the perpetrator "conviction-proof". Scheflin, *Forensic Hypnosis: Unanswered Questions*, 22 Australian Journal of Clinical and Experimental Hypnosis No. 1, p. 26 (1994).

Restrictive tests of competency can cultivate the misuse of hypnosis in other ways. This is even more apparent in instances of the most severest form of child sexual abuse, sadistic and ritual child sexual abuse. The forced ingestion of narcotics, drugs, or hallucinogens used to induce a hypnotic trance has been known to be a facet of sadistic abuse, ritual abuse and cult ritual abuse. See for example, Idaho Code § 18-1506A (1994); Illinois Revised Statutes, §5/12-33; Louisiana Revised Statutes Ann. §14:107.1 (1995); and Montana Code Ann. §45-5-627 (1994). It would indeed be a perversion of justice if those victims who suffer the severest form of child sexual abuse are prevented from testifying because of the perpetrators failure to comply with the multi-factored test adopted by the court of appeals.

The interests at stake are of compelling public importance and effect numerous individuals other than the parties.

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[2] Despite ethical and criminal proscriptions, sexual contact between therapists and patients occurs. Several self-reporting surveys report that "[a]s high as 13.7 percent of male [therapists responding] and 3.1 percent of female respondents have reported engaging in some form of erotic contact with at least one patient". Jorgenson, et al, *Therapist-Patient Sexual Exploitation And Insurance Liability*, 27 Tort & Ins. L. J. 595 (1992).

B. CERTIORARI SHOULD BE GRANTED TO DECIDE AN ISSUE LEFT UNDECIDED BY THIS COURT IN *ROCK V ARKANSAS*

In *Rock v Arkansas*, 483 U.S. 44 (1987), a majority of this Court found unconstitutional the state of Arkansas' per se rule of exclusion of post-hypnotic testimony of criminal defendants, recognizing the criminal defendant's constitutional right to testify on his or her own behalf as guaranteed by the Fifth Amendment privilege against self-incrimination, the Sixth Amendment rights to compulsory process and to conduct one's own defense, and the Fourteenth Amendment right to due process. *Id.* 46-47. *Rock* expressly limited its holding to cases involving the investigative or forensic use of hypnosis on criminal defendants, as opposed to its therapeutic use on civil litigants or witnesses in civil cases. *Id.* at 50, n.15. *Rock* did not address the competency of a civil litigant to testify chronologically following the therapeutic use of hypnosis for approved medical purposes.

Paradoxically, if the decision of the court of appeals in this case is left to stand, a previously hypnotized perpetrator hypnotized for the events being litigated could be permitted to testify under *Rock*, while a previously hypnotized victim's testimony could be barred when hypnotized for recognized therapeutic reasons. In contrast to the exclusionary result reached by the court of appeals, "a majority of federal courts and many state courts hold such testimony totally admissible and allow the jury to determine its credibility and weight". Comment, *Recovered Memories of Childhood Sexual Abuse: The Admissibility Question*, 68 Temple L. Rev. 249, 258 (1995). This was the approach followed by the Ninth Circuit even in such forensic precedents as *Wyller v Fairchild Hill Corp.*, 503 F.2d 506 (9th Cir. 1974), *Kline v Ford Motor Co.*, 523 F.2d 1067 (9th Cir. 1975), and *United State v Awkard*, 597 F.2d 667 (9th Cir. 1979), cert. denied, 444 U.S. 885 (1979).

Moreover, the court of appeals requirement that the hypnotist be "appropriately qualified by training in psychiatry or psychology" is not only ill-defined, but could preclude dentists, pain specialists, physical therapists, rehabilitation specialists, habit control specialists, hypnotherapists, social workers, optometrists, chiropractors, the

clergy, medical doctors lacking the judicially defined "appropriate training in psychiatry or psychology", and other professionals from using hypnosis as a therapeutic tool. Indeed, under the court of appeal's test, those professionals may already have jeopardized the legal rights of their patients regardless of the extent of the hypnotic skills. Worse yet, those individuals who have already been hypnotized for approved therapeutic purposes by professionals other than psychiatrists and psychologists, may now be in jeopardy of losing their legal right to testifying.

The nonexclusive multi-factored "totality of the circumstances" test is flawed in other respects. The need for a permanent record assumes that the sworn testimony of the hypnotist is insufficient. This factor automatically assumes an untruthful hypnotist. Those individuals who have been hypnotized for therapeutic purposes in the past, may now have lost their right to testify because no permanent record exists or can be found.

The requirement of corroboration may operate as an evidentiary bar to victims of crimes lacking eyewitnesses, common in instances of rape, sexual assault, child sexual abuse, and for many other crimes. Although offered by the petitioner, lack of corroboration should not bar the testimony, nor should it prove the non-occurrence of the abuse. "Otherwise, victims would have no remedy in cases where the abuse is non-violent or occurs in a private setting, making corroboration more difficult to obtain". Comment, *Recovered Memories of Childhood Sexual Abuse: The Admissibility Question*, 68 Temple L. Rev. 249, 278 (1995).

The hypnotizablity factor may result in an arbitrary evidentiary bar for many civil litigants. There are a number of scientific scales and tests developed for measuring hypnotizability, among them the Harvard Group Scale and the Stanford Hypnotic Suggestibility Scale. See, Kanovitz, *Hypnotic Memories and Civil Sexual Abuse Trials*, 45 Vand. L. Rev. 1185, 1238, n.227 (1994). Hypnotizability is a measure of the individual trait of susceptibility to hypnosis. It is no more appropriate to bar the testimony of an individual's testimony based upon the trait of hypnotizability, than it is to bar testimony on the basis of skin color, gender or ethnicity. This factor requires a litigant to act as a polygraph, rather than

leaving the question of credibility to the jury. Consideration of hypnotizability as a precondition to testifying condones the discriminatory and arbitrary exclusion of relevant evidence.

Lastly, the methodology used by the court of appeals allowed it to evaluate the content of the petitioner's claims unrelated to the hypnosis and to the Respondents and to judge credibility. *Borawick*, at 609. The court of appeals stated: "[t]hat Borawick has made these far-fetched, uncorroborated accusations against others, in addition to the defendants, erodes our confidence in the allegations against Morrie and Christine Shay and properly *weighs* against the admissibility of her [court determined] hypnotically-induced memories". *Id.* Aside from the fact that the petitioner was never required by the district court to prove these unrelated claims as a precondition to testifying, the court of appeals decision was made without consideration of the Federal Rape Shield Statute, Fed. R. Evid. 412. The rape shield statute is designed to protect *victims* and *alleged victims* of sexual assault from any negative inference cast by being a victim of multiple assaults.

The court of appeals equated a competency determination with a credibility determination in a complex psychological damage case without having the expertise to do so and contrary to Fed. R. Evid. 601's specific command that "every person is competent to be a witness". If the decision of the court of appeals is allowed to stand, it will condone the practice of permitting appellate court judges to make credibility assessments on contested issues of fact, usurping the role of the jury at the expense of civil litigants constitutional rights to due process and a jury trial.

The court of appeals mischaracterized its own "totality" test. The only way a "totality of the circumstances test" can fairly be applied is at or near the time of trial, when discovery is complete and the totality of the circumstances are before the court. It is inconceivable that the court of appeals reviewed the totality of the circumstances when it failed to remand the case to the district court for further discovery or even application of its own test. The district court denied the petitioner's timely motion to extend the time for taking depositions and did not rule upon the petitioner's motion to reopen discovery at a critical stage in the case; before the motion in

limine was acted upon. *Borawick*, at 599-600. The petitioner also moved to reopen discovery a second time. In *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986), this court recognized that summary judgment be refused where the nonmoving party has not had the opportunity to discover information that is essential to its opposition. The Second Circuit recently reaffirmed this principle in *Sutera v Schering Corp.*, 73 F.3d 13 (2d Cir. 1995). Litigants, like the petitioner, should not be forced to oppose an exclusionary motion in limine the granting of which was the functional equivalent of entering summary judgment or forced to meet evidentiary tests without being able to fully conduct discovery.

II. CONCLUSION

Therapeutic hypnosis has been endorsed by the American Medical Association, American Psychiatric Association, American Psychological Association, and more recently an independent panel of the National Institutes of Health has recognized its benefits. The widespread use of hypnosis overlays with the harsh reality of the prevalence of childhood sexual abuse and sexual assault in our nation and the lasting psychological injury they cause.

The court of appeals decision profoundly effects the legal rights of any civil litigant who has previously been hypnotized. To adopt an evidentiary barrier for testimony chronologically following hypnosis, ignores Federal Rule of Evidence 601's mandate that all witnesses are competent to testify except as otherwise noted in the succeeding rules of Article Six. The test adopted by the court of appeals is flawed in several respects. The Amici join in respectfully requesting this Court to review the Court of Appeal's decision.

Respectfully submitted,
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In The

Supreme Court Of The United States

October Term, 1995

JOAN S. BORAWICK
Petitioner

v.

MORRIE SHAY AND CHRISTINE SHAY
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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EDITOR'S NOTE

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STATEMENT OF JURISDICTION

The court of appeals entered judgment on October 17, 1995 and served the Petitioner by mail. On December 29, 1995 it denied this Petitioner's petition for rehearing and suggestion for rehearing *en banc*. In accordance with Rule 13(3), the time for filing this petition for writ of certiorari runs 90 days from the December 29, 1995 denial of the petition for rehearing, and would have expired at 5:00 p.m. on March 28, 1996. Therefore, the petition for writ of certiorari was timely filed on March 28, 1996.

The Petitioner filed a timely petition for rehearing in the court of appeals on October 31, 1995, well before the November 3, 1995 deadline. A timely petition for rehearing with the court of appeals operates to suspend the finality of its judgment and tolls the time for filing a petition for writ of certiorari. In the instant case, the time computation is 90 days from the December 29, 1995 denial of rehearing, or on or before March 28, 1996. The petition for writ of certiorari was timely.

REPLY TO RESPONDENTS' STATEMENT OF THE CASE

The Respondents' incorrectly cast the Petitioner's first timely discovery motion for enlargement of time to take depositions filed with the district court (Resp. Br. 2). This motion for enlargement of time to take depositions was expressly "for purposes of conducting nonparty depositions". The Respondents consented to the motion (R.). The district court's denial of the motion illustrates the difficulty encountered by the Petitioner in developing the record before the district court and on appeal. The Petitioner was prevented in obtaining the corroboration necessary to successfully oppose the Respondents' motion *in limine*.

The Petitioner had a right to engage in discovery under the Federal Rules of Procedure and the district court's standing order. She merely sought an extension of time to take depositions of nonparties as is customary in any civil action. The first timely motion for enlargement was filed four months before the Respondents filed their motion *in limine* and over three months after the discovery deadline expired. Thereafter, the Respondents

obstructed attempts to depose nonparty witnesses and other family members. The Petitioner could not have anticipated the contours of the test set by the Magistrate Judge in her March 24, 1993 ruling rendered eight months after the first timely motion for enlargement. *Borawick v Shay*, 842 F. Supp. 1501 (1994).

The February 10, 1993 motion to take depositions was filed by the Petitioner only 14 days after a ruling on a contested dispositive motion for judgment, and well before the Respondents' motion *in limine* was acted on by the Magistrate Judge (App. to Pet. for Cert. 36A-44A). The Respondents' dispute the Petitioner's assertion that the February 10, 1993 motion was not acted upon (Resp. Br. 2). Despite the Respondents' contention, the record reflects that the motion was not ruled upon by the Magistrate before she granted the Respondents' motion *in limine*. (R.). The Court of Appeals recognized this procedural irregularity stating: "Borawick's second motion to enlarge time for discovery, filed on February 10, 1993, **was not ruled upon**". The motion sought leave to depose out-of-state nonparty witnesses. The Respondents obstructed this attempt to take nonparty depositions by filing an objection on February 19, 1993. The Petitioner was not free to take depositions of corroborating witnesses or to freely engage in discovery after the motion *in limine* was filed or even after the first six months her case was pending in the district court.

The February 10, 1993 motion was withdrawn without prejudice after the Magistrate Judge granted the Respondents' motion *in limine* and because of the Magistrate Judge's refusal to consider corroborative evidence. *Borawick v Shay*, 842 F. Supp. 1501, 1508, n.5 (D. Conn. 1994). The February 10, 1993 motion was renewed after the Petitioner submitted additional corroboration, including the corroborating letters from her younger sister, and immediately after the Magistrate Judge stated in her recommended ruling on Defendants' Motion For Summary Judgment that: "[t]his result is an unfortunate one, in that plaintiff apparently has been unable to develop any independent evidence such as the testimony of her sister". (App. to Pet. for Cert. 36A-44A). Bifurcating decision on many of the critical motions in the case, the renewed motion for enlargement was not referred to the

Magistrate Judge but instead, was retained by the district court judge and denied. (App. to Pet. for Cert. 7A).

There is nothing irrelevant about the information at pages 49A-68A of the Petitioner's Appendix. The affidavit and writing at pages 62A-66A independently corroborate the Petitioner's claims. The newspaper article at page 67A-68A places the Petitioner's family history concerning her father, his abuse of alcohol and felonious conduct in context. This material was included in an addendum with the Petitioner's petition for rehearing. The Petitioner's motion for submission of the addendum was granted by the court of appeals and thus is properly before this court (App. to Resp. Br. 8A).

REPLY

I. THE PETITION FOR REHEARING WAS TIMELY, AND THEREFORE THE PETITION FOR WRIT OF CERTIORARI WAS TIMELY FILED WITH THIS COURT ON MARCH 28, 1996

The Respondents do not dispute that the Petitioner's petition for writ of certiorari was filed on March 28, 1996. They claim the Petitioner is not entitled to the benefit of the 90 day tolling provision contained in Supreme Court Rule 13.3. The tolling rule provides:

> [t]he time to file a petition for writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice). But if a petition for rehearing is timely filed in the lower court by any party, the time to file the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment. Supreme Court Rule 13.3.

The judgment of the court of appeals was filed October

17, 1995 and served upon the Petitioner by mail. The Petitioner filed her petition for rehearing and suggestion for rehearing *en banc*, together with an addendum, fourteen days later by United States Express Mail on October 31, 1996 (R.).

Without any supporting authority, the Respondents argue that the Petition for Rehearing was untimely because, for unsupported reasons, it is not entitled to the benefit of F.R.A.P. 25(a)'s general provision on filing and service. Rule 25(a) provides: "that briefs and appendices are treated as filed on the day of mailing if the most expeditious form of delivery by mail, except special delivery, is used".

The rule for filing a petition for rehearing, F.R.A.P. 40(b), provides: "copies shall be served and *filed* as prescribed by Rule 31(b) for the service and *filing* of *briefs*". Section 31(b) sets forth the procedure for "filing" briefs. The more specific provisions of Rule 31(b) treat a petition for rehearing as a brief for purposes of "filing", and thus the general provision regarding expeditious mail service for briefs contained in F.R.A.P. 25 (a) would apply to petitions for rehearing. Prior to filing the petition for rehearing, counsel for the Petitioner also confirmed with a clerk in the Second Circuit that "filing" on the date a petition for rehearing was mailed by U.S. Express Mail was the customary practice of the court of appeals for petitions for rehearing. This is consistent with the plain language of the rules.

The Respondents cannot seriously argue that F.R.A.P. 25 is inapplicable to the filing of a petition for rehearing. If that were the case, the remaining provisions concerning service of all papers, manner of service, proof of service and number of copies would likewise be inapplicable to the filing of a petition for rehearing. F.R.A.P. 25(b)-(e). This is illogical.

Since the Petitioner was served with the court of appeals judgment by mail, she would also be entitled to an additional three days of mail time per F.R.A.P. 26(c). The petition for

rehearing is a "paper" within the meaning of F.R.A.P. 26(c). With the additional three days, the Petitioner had until November 3, 1995 to file or Express Mail her petition for rehearing. The fact that a motion was later filed by the Petitioner with regard to the addendum is inconsequential. For jurisdictional purposes, the petition for rehearing was timely filed on October 31, 1995. Indeed, the petition for rehearing was filed early.

The identical argument was raised by the Respondents in the court of appeals and not accepted. This argument is further undermined by the fact that the court of appeals allowed the filing of the petition for rehearing, considered it on its merits, treated it as timely, and stayed its mandate until January 5, 1996. F.R.A.P. 41(a) provides that the **timely** filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. The stay of the mandate was considered determinative of the timeliness of a mislabelled petition for rehearing in *Missouri v Jenkins*, 495 U.S. 33, 48-49 (1990).

It is a long held rule that "where the court allows the filing and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial, and the time for appeal runs from the date thereof." *Bowman v. Loperena*, 311 U.S. 262, 266 (1940); *Pfister v. Northern Illinois Finance Corp.*, 317 U.S. 144 (1942). The petition for rehearing tolled the start of the period in which a petition for certiorari must be sought until rehearing is denied. *Missouri v Jenkins*, 495 U.S. 33, 45 (1990); *Department of Banking v. Pink*, 317 U.S. 264, 266 (1942).

The petition for rehearing was denied on December 29, 1995 and the instant petition was timely filed with this court within 90 days, on March 28, 1996. Had the petition been untimely, the Clerk of the Supreme Court was empowered under Supreme Court Rule 13.3 to "refuse any petition for a writ of certiorari which is jurisdictionally out of time". Significantly, the Clerk accepted the petition for writ of certiorari and docketed the case.

II. THE PETITIONER SEEKS REVIEW OF THE COURT OF APPEAL'S ENTIRE TEST, INCLUDING THE FACTOR CONCERNING QUALIFICATIONS OF THE HYPNOTIST; WHO WAS QUALIFIED FOR PURPOSES OF ENABLING THE PETITIONER TO TESTIFY

The Petitioner seeks review of the entire test adopted by the court of appeals, (Pet. for Cert. pp. 21-24), including the credentialling component of the court's multi-factored test. *Id.* at pp. 21-22. The Petitioner has consistently argued that the hypnotist was qualified for purposes of establishing her competency to testify. The hypnotist was capable of performing the hypnosis, and did not add new elements to the Petitioner's memory. (Pet. for Cert. App. 9). Among other things, the Petitioner seeks review of the qualification factor. The record does include a qualified hypnotist (See, Pet. for Cert. pp. 8-9). The hypnosis was performed by a certified hypnotist having nearly 50 years practical experience.

Regardless of whether the hypnotist (St. Regis) was qualified, which he was in this case for the purposes noted, significantly the Respondents make no mention of Fed.R.Evid. 601's requirement that all witnesses shall be competent to testify. Had the Petitioner been hypnotized by an amateur lacking the certification, training and life-time experience of St. Regis, she still should have been permitted to testify under F.R.E. 601.

The Petitioner's citation to cases involving ritual abuse and statutes defining this crime, illustrate the need for review by this court. The "totality of the circumstances test" adopted by the court of appeals is universal in application and applies to persons other than the litigants. The use of hypnotic drugs and hallucinogens to induce hypnosis is expressly addressed in the statutes brought to the attention of this Court. (Pet. for Cert. p. 24). The use of hypnosis can be an aspect of ritual abuse. A

report prepared by the Los Angeles County Commission For Women's Ritual Abuse Task Force states:

> The psychological abuse which is inflicted as part of ritual abuse causes severe mental and emotional suffering to the victims. Victims are subjected to profound terror as well as mind control techniques so severe that most victims dissociate their memories of the experience and lose their sense of will. Some reported examples [are]... mind altering drugs which alter the victim's perception, interfere with the victim's resistance to the assault, and cloud the victim's recall of the details of the abuse. Sophisticated uses of hypnosis, indoctrination, programming, and the use of triggering. *Ritual Abuse: Definitions, Glossary, The Use of Mind Control*, Report of the Ritual Abuse Task Force, Los Angeles County Commission for Women (September 1, 1994).

Contrary to the Respondents' claims at page 7 of Respondents' brief, psychological manipulation, the misuse of hypnotic drugs and hypnosis are conduct characteristic of ritual child abuse. The Continuing Legal Education Division of the South Carolina Bar also has an extensive treatment of ritualistic child abuse in its resource manual for attorneys and guardians ad litem[1]. Citation to these authorities are relevant because of the court of appeal's complete incredulity in ritual child abuse and Petitioner's claims concerning multipertpetrator abuse (Pet. for Cert. App. 29A-30A). Although it was erroneous to do so, the court of appeals deemed these unrelated claims relevant to the issue of the Petitioner's competency to testify. *Id.* at 30A. The Respondents cannot now claim that this subject matter is irrelevant when it was the Respondents who raised these unrelated claims in their motion *in limine* filed under seal in an effort to obfuscate the issues pertaining to the allegations of sexual abuse involving themselves. Moreover, both the court of appeals and the Respondents have inappropriately assumed that the Petitioner's claims with respect to nonparties filed under seal cannot be

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[1] Representing Children In Family Court: A Resource Manual for Attorneys and Guardians Ad Litem (1995).

corroborated. Had the Petitioner's discovery motions been granted, the record would have been more fully developed.

The Petitioner does not claim that human memory is always perfect. What the current scientific research on hypnosis and memory demonstrates is that hypnotic efforts do improve recall under some conditions for some individuals. Hammond, et al, *Clinical Hypnosis and Memory: Guidelines For Clinicians and For Forensic Hypnosis* (American Society of Clinical Hypnosis Press, February 1995) p. 14. After review of numerous scientific studies, the ASCH panel concluded hypnosis was no more likely to contaminate memory than the ordinary processes recognized with eyewitness testimony, interrogative questioning, interviewing, or other forms of suggestion. *Id.* at 22. In other words, legal rules that single out hypnosis for restrictive treatment are scientifically unwarranted. *Id.* at 23.

III. A CONFLICT EXISTS AMONG THE CIRCUITS

The issue of the competency of the Petitioner to testify chronologically following therapeutic hypnosis was of first impression for the Second Circuit. The fact, however, that the court of appeals extended forensic hypnosis precedents to its therapeutic use does creates a definite conflict of authority and raises an issue of compelling public importance. The therapeutic use of hypnosis is so commonplace that this issue is likely to repeat itself in *any* type of case. In addition, by legislative enactment, at least twenty-three jurisdictions toll the statute of limitations for plaintiffs who have repressed memories of childhood sexual abuse. Comment, *Recovered Memories of Childhood Sexual Abuse: The Admissibility Question*, 68 Temple L. Rev., 249, 257 (1995). Moreover, if the decision of the court of appeals is left to stand, it could arise in any civil case and could result in habeas corpus proceedings on this issue. The issue will repeat itself, is of enormous social importance[2] and will create havoc in the mental health community.

[2] The National Institute of Justice estimates the annual cost of child abuse to be $56 billion dollars. *Victim Costs and Consequences A New Look*, 1996. Bureau of Justice Statistics, U.S. Dept of Justice, NCJ-155282, February 1996.

The Respondents dismiss the common law precedent adopted by the Second Circuit in *United States v. Miller*, 411 F.2d 825 (2d Cir. 1969) on the basis that *Miller* was decided before enactment of the Federal Rules of Evidence (Resp. Br. p.9). This contention ignores this court's view of "the pertinence of background common law in interpreting the Rules of Evidence". *Daubert v Merrell Dow Pharmaceuticals*, 113 S.Ct. 2786, 2793 (1993), citing *United States v Abel*, 469 U.S. 45 (1984).

The Respondents incorrectly contend that the district court adopted the approach of the Eighth Circuit in *Sprynczynatyk v General Motors Corp.*, 771 F.2d 1112 (8th Cir. 1985), *cert. denied*, 475 U.S. 1046 (1986). Had the district court adopted the Eighth Circuit's approach, it would have conducted an evidentiary hearing. The district court adopted a "safeguard approach", not the Eighth Circuit's totality of the circumstances test. (Pet. for Cert. App. 8A-9A). Likewise, had the court of appeals followed the Eighth Circuit's approach, it would have remanded for an evidentiary hearing and given the petitioner the opportunity to meet the test. While making passing reference to F.R.E. 104, notably, the Respondents disregard F.R.E.104 (c)'s requirement of a hearing on preliminary matters when the "interests of justice so require".

Biskup v McCaughtry, 20 F.3d 245 (7th Cir. 1994), *cert. denied*, U.S. (March 18, 1996), is not the Seventh Circuit's most recent pronouncement on the subject of hypnosis (Resp. Br. 9). Rather, *Armstrong v Young*, 34 F.3d 421 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 1369 (1995), was decided after *Biskup*. The *dicta* from *Biskup* cited by the Respondents is misquoted and taken out of context (Resp. Br. p. 10). Moreover, *Biskup* is hardly supportive of exclusion of the Petitioner's testimony. In *Biskup*, the Seventh Circuit affirmed denial of a habeas corpus petition approving admission of post-hypnotic testimony despite due process and confrontation clause challenges.

IV. THE PETITIONER'S FIFTH AMENDMENT AND SEVENTH AMENDMENT CLAIMS ARE MERITORIOUS

The Respondents cannot credibly argue that the Petitioner has

no constitutional right to bodily integrity or the right to be free from sexual abuse. While it is duly recognized that this is not a "right to die" case, this court has recognized the fundamental due process liberty interests of an individual to bodily integrity and personal autonomy. *Cruzan v Director*, MDH, 497 U.S. 261, 278 (1990).

Significantly, the Respondents did not address the Petitioner's Seventh Amendment claim of error by the court of appeal in reviewing the content of the petitioner's claims and assessing her credibility. Pet. for Cert. p. 29. The Respondents also did not address the Petitioner's procedural due process claims in being deprived a hearing or the ability to take nonparty depositions. Pet. for Cert. p. 28.

The Respondents argument regarding Fed. R. Evid. 412 is absurd (Resp. Br. 11). Of course the Petitioner did not raise Fed. R. Evid. 412 before the district court, because the rule had not yet been enacted. The rape shield issue was briefed by the Respondent in the court of appeals when the rule was merely proposed (R.). Rule 412 became effective December 1, 1994, before oral argument in the court of appeals. The newly effective rape shield statute, applicable to this pending action, was brought to the attention of the court of appeals during oral argument by counsel for the Petitioner on December 19, 1994. Nevertheless, the court of appeals made no mention of FRE 412 in its decision and did not remand even for this purpose.

CONCLUSION

The petition for a writ of certiorari should be granted.

THE PETITIONER,

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